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**Supreme Court of the United States**

**OCTOBER TERM, 1945**

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**No. 424**

**KENNECOTT COPPER CORPORATION,  
PETITIONER,**

*vs.*

**STATE TAX COMMISSION; AND J. LAMBERT GIB-  
SON, ROSCOE E. HAMMOND, MILTON TWIT-  
CHELL, AND HEBER BENNION, JR., CONSTITUT-  
ING SAID STATE TAX COMMISSION**

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**No. 425**

**SILVER KING COALITION MINES COMPANY,  
PETITIONER,**

*vs.*

**STATE TAX COMMISSION; AND J. LAMBERT GIB-  
SON, ROSCOE E. HAMMOND, MILTON TWIT-  
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ING SAID STATE TAX COMMISSION**

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**ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE TENTH CIRCUIT**

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**PETITION FOR CERTIORARI FILED SEPTEMBER 12, 1945.**

**CERTIORARI GRANTED NOVEMBER 5, 1945.**

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

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[fol. a] [Caption omitted]

[fol. 1]

**IN THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF UTAH, CENTRAL DIVISION**

PLEAS AND PROCEEDINGS BEFORE THE HONORABLE TILLMAN D.  
JOHNSON, JUDGE OF THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF UTAH, PRESIDING IN THE FOLLOWING-  
ENTITLED CAUSE:

No. 671 Civil

KENNECOTT COPPER CORPORATION, a Corporation, Plaintiff,

vs.

STATE TAX COMMISSION, and J. LAMBERT GIBSON, ROSCOE E.  
HAMMOND, MILTON TWITCHELL, and HEBER BENNION, JR.,  
constituting said State Tax Commission, Defendants

COMPLAINT—Filed August 15, 1944

Plaintiff for its cause of action alleges:

1. The grounds upon which the jurisdiction of this court depends are as follows:

(a) Diversity of citizenship between the parties plaintiff and defendants as hereinafter set forth;

(b) The action arises under the constitution and laws of the United States, particularly Article I, Section 8, of the Constitution of the United States, empowering Congress to declare war and prosecute the same, and Article I, Section 10, of the Constitution of the United States, denying that power to the states; the Emergency Price Control Act of 1942, approved January 30, 1942 (56 Stat. 23, as amended October 2, 1942, 56 Stat. 767, 50 U. S. C. App. 901, 902(e)), the purpose of which, among others, was, and is, to secure the maximum necessary production of any commodity essential to the prosecution of the war and for that purpose to make subsidy payments to domestic producers in such amounts and in such manner and upon such terms and conditions as may be determined to be necessary to obtain such maximum necessary production; Executive Order No.

[fol. 2] 9250, Title V, as amended by Executive Order No. 9281 (50 U. S. C. App., Section 901, p. 311), pursuant to authority conferred by said Emergency Price Control Act of 1942, by which order Metals Reserve Company was, and is, authorized to subsidize, if such measure be necessary to insure the maximum production and distribution of any commodity necessary to the successful prosecution of the war; the Second War Powers Act, being the Act of June 28, 1940 (54 Stat. 676), as amended March 27, 1942, c. 199, Title III, Section 301 (56 Stat. 177, 50 U. S. C. App., Section 633, p. 274), whereby the President of the United States was, and is, authorized to allocate all production in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the National defense; and the Fourteenth Amendment to the Constitution of the United States, wherein it is provided that no State shall deprive any person of property without due process of law.

The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand (\$3000.00) Dollars.

2. Plaintiff, Kennecott Copper Corporation, is now, and at all times hereinafter mentioned was, a corporation incorporated and existing under the laws of the State of New York, and is now, and at all said times was, a citizen of the State of New York, and no other State. The defendant, State Tax Commission, is a distinct legal entity created by Article XIII, Section 11, of the Constitution of the State of Utah, and by said Article XIII, Section 11, of said constitution, there was vested in said State Tax Commission, solely and exclusively, the power, among others, of administering and supervising the tax laws of the State of Utah, of assessing mines and equalizing the valuation and assessment of property among and within the several counties, of establishing systems of public accounting, reviewing proposed bond issues, and of revising the tax levies and budgets of the local governmental units. And said provisions of the Constitution of the State of Utah were further effectuated by the Statutes of the State of Utah, more particularly c. 5 of Title 80, Utah Code 1943, especially Sections 80-5-37 to [fol. 3] 80-5-55, inclusive, and 80-5-65 to 80-5-82, inclusive, and said State Tax Commission was empowered thereby, more particularly by Sections 80-5-46(1) and 80-5-76, Utah Code, 1943, to sue and be sued in its own name in any court of



competent jurisdiction, and by Section 80-5-41 to employ, among others, such attorneys, agents, statisticians, experts and other agents and employees as might be necessary in the performance of its duties. Said defendant, State Tax Commission, is a citizen of the State of Utah, and no other State. Defendants, J. Lambert Gibson, Roscoe E. Hammond, Milton Twitchell and Heber Bennion, Jr., are members of, and as such members at all times hereinafter alleged constituted, and now constitute, said State Tax Commission. Each of said defendants last named is a citizen of the State of Utah, and no other State.

3. The controversy herein is wholly between citizens of different States, and the matter in controversy exceeds the sum of \$3,000.00, exclusive of interest and costs.

4. Plaintiff, Kennecott Copper Corporation, is a mining corporation, is and has been the owner of and operating certain mines and mining claims and mining property, leaching plants, precipitating plants, pipe lines and facilities in Bingham Canyon, in the West Mountain Mining District in Salt Lake County, Utah, and for the reduction of ores mined and produced by plaintiff from said mines and mining claims plaintiff is and has been the owner of and operating certain reduction works and milling plants situated in Salt Lake County, Utah, in and in the vicinity of the unincorporated settlement of Magna, in said county and state, distant from said mines of plaintiff approximately 17.2 miles. Plaintiff's said mining property is commonly known as the Utah Copper Mine.

5. In order to recover the metals from the precipitates and concentrates resulting from said operation, said precipitates and concentrates must be smelted and converted into blister copper, which carries copper and other metals, including precious metals, and said blister copper must be refined and the metals therein separated each from the other; and plaintiff has delivered and delivers its said precipitates and concentrates to the American Smelting and Refining Company, which owns and operates a custom [fol. 4] smelter near the Town of Garfield, in Salt Lake County, Utah, approximately three miles distant from plaintiff's said reduction and milling plants at and in the vicinity of Magna; and American Smelting and Refining Company, as a bailee, has received and smelted said precip-

itates and concentrates and converted the same into blister copper, and has thereupon shipped the whole of said product to points outside the State of Utah and has refined said blister copper in its refineries in states other than the State of Utah, and said American Smelting and Refining Company, said bailee, has at all the times herein mentioned returned to plaintiff in separated form the equivalent of the copper, gold, silver and other metals owned by plaintiff. Plaintiff has at all times received from said American Smelting and Refining Company, stored and sold its separated metals outside the State of Utah. Over the period hereinafter referred to and herein involved plaintiff produced by and from its said Utah Copper Mine approximately thirty percent of all copper produced in the United States, and plaintiff's operation in and by its said Utah Copper Mine throughout said period was, and now is, essential to the successful prosecution of the war.

6. On April 11, 1941, the President of the United States by his Executive Order No. 8734, as amended by his Executive Order No. 8875, August 28, 1941 (Vol. 9, U. S. C. Cong. Ser. 1941, pp. 852, 867), created the Office of Price Administration, established an Administrator at its head, and defined the Administrator's duties, among which duties was that of prescribing maximum prices and all elements of cost or price of materials or commodities, and enforcing their observance; and pursuant to authority thus conferred, price schedules were established August 12, 1941, and it was thereby provided, among other things, that no person should sell or offer to sell, buy or offer to buy, or accept delivery of copper at prices higher than the maximum of twelve cents per pound. And by the signature of the President, on January 30, 1942, the Emergency Price Control Act of 1942 became law (c. 26, 56 Stat. 23; 50 U. S. C. App., Section 901, p. 310). And by said Act said Price Administrator was empowered, on behalf of the United States, in such manner and upon such terms and conditions as he should determine to be necessary to obtain the maximum [fol. 5] necessary production of any commodity essential to the successful prosecution of the war, to make subsidy payments to domestic producers of such commodities in such amounts and in such manner and upon such terms and conditions as he should determine to be necessary to obtain such maximum necessary production thereof (50 U. S. C.

App., Section 902(e), p. 319). Metals Reserve Company is, and at all the times herein mentioned was, a corporation created pursuant to Title XV, U. S. C., Section 606(b), being Section 5(d) of the Reconstruction Finance Corporation Act as amended (15 U. S. C., Sections 606(b), 609 (j)), and as such an Agency of the United States. And by said Emergency Price Control Act of 1942 it was provided that "such commodities may be bought or sold or stored or used, and such subsidy payments to domestic producers thereof may be paid, only by corporations created or organized pursuant to such Section 5(d), except that in the case of the sale of any commodity by any such corporation, the sale price therefor shall not exceed any maximum price established pursuant to subsection (a) of this section (50 U. S. C. App., Section 902(a), p. 319), which is applicable to such commodity at the time of sale or delivery". And the President of the United States made his Executive Order No. 9250, Title V, as amended by his Executive Order No. 9281 (50 U. S. C. App., Section 901, p. 311), and pursuant to the authority conferred upon him by said Emergency Price Control Act of 1942 created the Office of Economic Stabilization, and at the head of said office he established an Economic Stabilization Director, and authorized said Director to direct said Metals Reserve Company, among others of said corporations created or organized pursuant to said Section 5(d), to use its authority to subsidize, where such measure necessary to insure the maximum necessary production of any commodity.

7. It being found that under said established price ceilings, costs to be encountered in the production of copper and other metals essential to the successful prosecution of the war were too high to insure the maximum necessary production required for armament and other purposes of war, and copper and said other metals in such maximum necessary production being indispensable for said purposes, and stimulation of production of said metals to said maximum necessary production being imperative and being possible only by raising the ceiling prices or by payment of a subsidy for increased production, the National government, impelled by the war emergency and impelled by the exigencies of war, paid, and still pays, subsidies for production of said metals in excess of quotas established jointly by the War Production Board and the Office of Price

Administration. Said subsidies were, and are being, paid by order of the Office of Price Administration, dated February 9, 1942, No. P. M. 2458, and under and pursuant to said order and by virtue of the authority hereinbefore alleged, said Metals Reserve Company pays, and has paid, a subsidy of five cents per pound for copper production over and above said fixed quotas, commencing February 1, 1942. Under this subsidy plaintiff was allotted a quota of 46,000,000 pounds of copper for its said Utah Copper Mine here involved, operated by Utah Copper Company, and it was provided, among other things, that should any property fail to maintain its quota production in any calendar month or months, no subsidy would be paid until the accumulated deficit was made up by over quota production in subsequent months. And it was further provided that where a company operated two or more properties and the production of any property should show a material decrease below its quota, the owning or operating company would be required to account for the decrease, and if found that such decrease had been due to avoidable circumstances, then that the existing quotas of all properties of such company would be cumulated into a single quota for that company, whereupon the subsidy would be paid only upon the excess production over and above the total cumulated company quota.

8. And the Office of Price Administration subsequent to February 9, 1942, issued certain supplementary orders authorizing subsidy payments of an additional five cents and more on copper production, such additional subsidy payments being thereby designated as B and C premiums, and on April 1, 1943, issued its Order No. M. P. R. 356, prohibiting the payment of royalty under mining leases wherein B and C premium payments should be included in the base upon which royalties might be computed, and that order stated that it was necessary and proper to establish maximum royalties paid in the mining of copper and said other metals in order to make certain that subsidies paid by Metals Reserve Company under the subsidy plan should not be dissipated, but should be preserved for the accomplishment of the single purpose of insuring the maximum necessary production of these essential metals. By that order the mine owner was denied participation in the B and C premiums as royalty lest there be thwarted thereby the single purpose in mind, i. e., to insure said maximum neces-

sary production to accomplish which said subsidy payments had been ordered.

9. Pursuant to authority conferred by the Second War Powers Act, being the Act of June 28, 1940 (54 Stat. 676), as amended March 27, 1942, c. 199, Title III, Section 301 (56 Stat. 177, 50 U. S. C. App., Section 633, p. 274), the entire copper production of this plaintiff from its Utah Copper Mine is, and at all times herein mentioned has been, sold and distributed only upon allocation prescribed by the President of the United States as the President has deemed necessary or appropriate in the public interest and to promote the national defense.

10. Under and pursuant to said subsidy, payments thereof are computed on 97 percent of the copper contained by assay in plaintiff's concentrates. Sales of copper produced by plaintiff at its Utah Copper Mine generally follow by three months the concentration of its ores. The copper contained in plaintiff's concentrates produced in December of one year is not available for sale and is not sold before March of the succeeding year, but said subsidies are nevertheless paid by said Metals Reserve Company without regard to date or fact of sale, said subsidies are in no manner related to sales, are not computed on the refined metal produced, and the refined metal is plaintiff's ultimate product and plaintiff's only product that is sold or that is commercial in character. Said subsidy is paid for the sole purpose of insuring maximum necessary production, is based on excess production solely, without regard to the sale or other disposition of the product, and is not reflected in the product's value.

11. By Act of Congress (Revenue Act of 1942, Sections 209, 735, 26 U. S. C. Supp., p. 216), the subsidy payments [fol. 8] here involved were defined as special allowances, not income for purpose of excess profits tax under the Federal Revenue Act, one of the aims of said subsidy plan being that of compensating the mine owner thereby for losses to be incurred by forced or excess mine production, such as lower recoveries due to crowding milling plants and the mining of those ores only that could be produced at the maximum rate, thus resulting in the wasting of ores not readily serving that purpose.

12. Plaintiff was paid, and received, during the calendar year 1943 on account of said subsidy payments made by



Metals Reserve Company under the authority hereinbefore alleged and on plaintiff's excess copper production from its Utah Copper Mine for said year 1943, the sum of \$3,781,421.55.

13. At all times herein mentioned it was provided by the Statutes of Utah, that is to say, Section 80-5-66, Utah Code 1943, that "every person engaged in the business of mining or producing ore containing gold, silver, copper, lead, iron, zinc or other valuable metals in the State of Utah should pay to the State of Utah an occupation tax equal to one percent of the gross amount received for or the gross value of metalliferous ores sold" during the next preceding calendar year; and it was thereby provided that the basis for computing said occupation tax should be the amount of money, or its equivalent, actually received from the sale of all ores or metals during said calendar year. Every person engaged in the business of mining has been, and is, required to make and file with the defendant, State Tax Commission, each year a statement containing the total amount received during the preceding calendar year from the sale of ores and metals (Section 80-5-67 (3), (4)), and plaintiff filed with the defendant, State Tax Commission, in due time its statement accordingly.

14. Notwithstanding the facts hereinbefore alleged, said defendant, State Tax Commission, and said other defendants comprising said Commission, erroneously added the said sum of \$3,781,421.55, the amount of said subsidy payments received by plaintiff as hereinbefore alleged, to the gross amount received by plaintiff from sales of its production made during the calendar year 1943, as though the said sum of \$3,781,421.55 were actually derived from such sales. Upon the total so obtained, said defendant, State Tax Commission, and said other defendants constituting the membership thereof, have erroneously and without authority of law levied against plaintiff an occupation tax for the year 1944 in the sum of \$815,443.35, as though upon sales of metals made by plaintiff in the year 1943. But the total of plaintiff's sales of metals made during the year 1943 on which said occupation tax should have been computed amounted to the sum of \$77,762,913.44, and thereupon an occupation tax of no more than the sum of \$777,629.13 could have been lawfully levied against this plaintiff, the said sum of \$3,781,421.55, the amount of said subsidy pay-

ments, having been made and received neither for nor on account of "metalliferous ores sold", nor were said subsidy payments in any manner related to ~~sales~~ of any kind or character whatever.

15. This plaintiff by its representatives in due time appeared before the defendant, said State Tax Commission, and said other defendants, and orally ~~protested~~ said assessment, and in writing on May 27, 1944, petitioned said defendant, said State Tax Commission, in the manner and within the time provided by law, for the abatement of said unlawful assessment and protested the same upon the grounds herein alleged and therein set forth at length. But said defendant, said State Tax Commission, and said other defendants denied plaintiff's said petition and protest, and unlawfully levied against plaintiff and upon said unlawful assessment a so-called mine occupation tax for the year 1944 in the sum of \$815,443.35, of which the sum of \$37,814.22 was levied upon said subsidy paid plaintiff by the National government for the purpose hereinbefore alleged, and on May 31, 1944, said defendant, said State Tax Commission, did collect from this plaintiff as and for said tax in said part unlawfully levied pursuant to said unlawful assessment made by said State Tax Commission and said other defendants as hereinbefore alleged the sum of \$815,443.35.

16. The Congress of the United States has conferred no right upon the State to tax said subsidy payments, or to seize or appropriate the same, or any part thereof, or in any [fol. 10] manner, or at all, to make said subsidies a source of revenue to the State. The inclusion by the said defendants of said sum of \$3,781,421.55 in said base upon which said occupation tax was computed by the defendant, State Tax Commission, and said other defendants, and upon which said assessment was made by it and them, and the levy thereupon of said additional tax of \$37,814.22 by it and them, were and are beyond the power or authority of said State Tax Commission or said other defendants, were and are contrary to law, and were and are void. Said attempted and unlawful assessment by said State Tax Commission and said other defendants, and said levy thereupon were and are an usurpation of power, were and are an unlawful seizure by said defendants of subsidies paid by the National government in the interest of national defense and to further the prosecution of war, were and are an immediate and

a direct and substantial interference with, and burden upon, the National government and the exercise by the National government of its legitimate function of prosecuting war, were and are an unlawful seizure by the defendants of subsidy payments the National government directed be paid to this plaintiff in the exercise by the National government of its power to wage war and, if permitted, the power of Congress to wage war will be impaired and may be destroyed by the act of others. Not only were said subsidy payments made by the National government to this plaintiff to insure the maximum necessary production of essential metal for use by the National government in the waging of war, to induce this plaintiff and other like industries to enter upon an operation in behalf of the National government and its legitimate function of prosecuting war, and as such secure under the law against seizure by the States or others, but said seizure by said defendants was, and is, wholly without authority from the State of Utah or otherwise or at all, wholly in excess of the power of said defendants, or any of them, was, and is, an arbitrary usurpation of power and a taking of plaintiff's property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and of Section 7 of Article I of the Constitution of the State of Utah.

17. This plaintiff further alleges that at the time here- [fol. 11] inbefore alleged, to-wit, on the 31st day of May, 1944, when said defendant, State Tax Commission, exacted payment by this plaintiff of said total sum of \$815,443.35, this plaintiff did pay said tax in said total sum of the defendant, State Tax Commission, but as to said portion thereof levied upon said unlawful assessment, to-wit, the sum of \$37,814.22, levied upon said subsidy payments in the sum of \$3,781,421.55, plaintiff made said payment under protest, demanded that said defendant make the record of its office show payment under protest accordingly, which said defendant did, and said sum according- was not covered into the general fund of the State, but was, and is, being held and retained, as by law provided, until it shall have been finally determined that said tax was lawfully or was unlawfully collected.

Wherefore, plaintiff prays judgment against said defendant, State Tax Commission, and said other defendants for the sum of \$37,814.22, together with interest thereon at the

rate of six percent per annum from the 31st day of May, 1944, and for plaintiff's costs of suit in this behalf incurred.

C. C. Parsons, Wm. M. McCrea, A. D. Moffat, Attorneys for Plaintiff.

Office & Post Office Address: 1003 Kearns Building, Salt Lake City, Utah.

Duly Verified:

# IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed September 5, 1944

Come now the Defendants and move the court to dismiss this action on the following grounds:

1. That the court has no jurisdiction over the subject matter of the action for the reason that the matter involved herein is not a controversy between citizens of different states in this, that this suit is in fact against the State of Utah and the State of Utah is not a citizen of any state [fol. 12] within the meaning and intent of the law defining this court's jurisdiction;

2. That the court has no jurisdiction over the persons of these defendants for the reason that the State Tax Commission is an agency of the State of Utah and the individual defendants are sued in their representative capacity as members of the State Tax Commission; and that it appears from the body of the complaint that the matter involved is one in which the State of Utah is primarily concerned and that the State of Utah only is concerned with and will be affected by any judgment rendered herein and that therefore the action is essentially an action against the State of Utah;

3. That the complaint herein does not state a claim upon which any relief can be granted by this court.

Grover A. Giles, Attorney General; Arthur H. Nielsen, Assistant Attorney General; W. L. Skanechy, State Tax Commission Attorney, Attorneys for Defendants, 236 State Capitol, Salt Lake City, Utah.

Received a copy of the above Motion this 5th day of September, 1944.

C. C. Parsons, Wm. M. McCrea, A. D. Moffat, Attorneys for Plaintiff.

## IN UNITED STATES DISTRICT COURT

MINUTE ENTRY—September 26, 1944

On this 26th day of September, 1944, plaintiff appearing by C. C. Parsons, its attorney, and defendant by A. H. Nielsen and W. L. Skanchy, its attorneys, and this case came on for hearing on motion to dismiss. The Court heard the arguments of counsel, and denied defendant's said [fol. 13] motion, and defendant given until October 10th to file its answer. Case set for pretrial on October 12, 1944.

## IN UNITED STATES DISTRICT COURT

ANSWER—Filed October 11, 1944

Defendants make answer to Plaintiff's complaint as follows:

1. For answer to Paragraph 1, Defendants deny that there is diversity of citizenship between the parties Plaintiff and Defendant to this action or that this action arises under the Constitution or Laws of the United States as in said Paragraph 1 alleged, or otherwise, or at all, or that any such facts exist, as set forth in said Paragraph, upon which jurisdiction of this court depends.

Defendants admit that the matter in controversy exceeds the sum of \$3,000.00, exclusive of interest and costs.

2. For answer to Paragraph 2, Defendants deny that the Defendant, State Tax Commission, is a citizen of the State of Utah, or of any state. Defendants admit the other allegations in said Paragraph 2 contained.

3. For answer to Paragraph 3, Defendants deny that the controversy herein is wholly between citizens of different states but admit that the matter in controversy exceeds the sum of \$3,000.00, exclusive of interest and costs.

By way of affirmative defense to the jurisdictional averments in Plaintiff's Paragraphs 1, 2, and 3 contained, Defendants allege that notwithstanding the State Tax Commission and J. Lambert Gibson, Roscoe E. Hammond, Milton Twitchell and Heber Bennion, Jr., members constituting said State Tax Commission, are named as Defendants



herein, none of said Defendants has any individual interest in the controversy; that the relief sought against these Defendants, and each of them, is only in their official capacity as representatives of the State of Utah; that the State of Utah is alone to be affected or compelled to pay any judgment which might be rendered against said defendants, and to the State of Utah alone will inure any benefits to accrue or result from any judgment in favor of Defendants herein. Defendants, therefore, allege that this action is one in which [fol. 14] the State of Utah, though nominally not a party Defendant, is, nevertheless, in truth and in fact, the real Defendant and that, therefore, there is no diversity of citizenship herein.

Defendants further allege that this suit is barred by the provisions of the 11th Amendment of the Constitution of the United States, which provides that the judicial power of the United States "shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State".

4. Defendants admit the allegations of Paragraph 4.

5. For answer to Paragraph 5, Defendants allege that they have insufficient facts to form a belief, and, therefore, deny the same.

6. Defendants admit the allegations contained in Paragraph 6.

7. For answer to Paragraph 7, Defendants deny that Metals Reserve Company pays and has paid a subsidy of five cents per pound for copper production over and above fixed quotas, but alleges the facts to be as hereinafter set forth in Defendants' affirmative defense.

Defendants otherwise admit the allegations in said paragraph contained.

8. For answer to Paragraph 8, Defendants allege that they have insufficient facts to form a belief and, therefore, deny the same.

9. Defendants admit the allegations of Paragraph 9.

10. For answer to Paragraph 10, Defendants admit that premium payments are computed on ninety-seven per cent of the copper contained by assay in Plaintiff's concentrates.

Defendants deny each and every other allegation in said paragraph contained.

11. For answer to Paragraph 11, Defendants admit that by act of Congress (Revenue Act of 1942, Sections 209, 735, 26 U. S. C. Supp., page 216), premium payments are excluded from the provisions of the excess profits tax under the Federal Revenue Act.

Defendants deny each and every other allegation in said paragraph contained.

12. For answer to Paragraph 12, Defendants allege that they have insufficient facts to form a belief and, therefore, deny the same.

13. For answer to Paragraph 13, Defendants admit that at all times mentioned in Plaintiff's complaint, Section 80-5-66, Utah Code Annotated, 1943, provided:

"\* \* \* every person engaged in the business of mining or producing ore containing gold, silver, copper, lead, iron, zinc or other valuable metal in this state shall pay to the state of Utah an occupation tax equal to one per cent of the gross amount received for or the gross value of metalliferous ore sold \* \* \*."

Defendants further admit that every person engaged in the business of mining is required to file with the Defendant, State Tax Commission, each year, a statement containing, among other things, the total amount received during the preceding calendar year from the sale of ores and metals (Section 80-5-67) and that Plaintiff filed with the Defendant, State Tax Commission, in due time its statement accordingly.

Defendants otherwise deny each and every other allegation in said Paragraph contained.

14. Defendants deny the allegations in Paragraph 14 contained.

15. For answer to Paragraph 15, Defendants admit that Plaintiff, in due time, protested the assessment made by the State Tax Commission and in the manner and within the time provided by law petitioned for the abatement of said tax in the sum of \$37,814.22, but that said Defendant, State Tax Commission, denied Plaintiff's Petition and Protest and levied against the Plaintiff a Mine Occupation Tax

for the year 1944 in the sum of \$815,443.35 and did there-  
after collect from this Plaintiff said amount.

[fol. 16] 16. For answer to Paragraph 16, Defendants deny each and every allegation therein contained.

17. For answer to Paragraph 17, Defendants admit that at the time therein alleged, to-wit, on the 31st day of May, 1944, Plaintiff paid to the State Tax Commission the said occupation tax in the total sum of \$815,443.35 and that Plaintiff, as to the sum of \$37,814.22 made said payment under protest and demanded that the State Tax Commission make the record of its office show payment under protest accordingly, which said Defendant did, and said sum accordingly was not covered into the General Fund of the State, but is being held and retained as by law provided until it shall have finally been determined whether such tax was lawfully or unlawfully collected.

Defendants otherwise deny the allegations in said Paragraph contained.

For further and separate defense, Defendants allege as follows:

1. That on February 9, 1942, the Office of Price Administration, pursuant to authority granted by law as in Paragraph 6 of Plaintiff's complaint set forth, authorized and directed Metals Reserve Company to pay a premium price for ores produced over and above quotas to be fixed jointly by the Office of Price Administration and the War Production Board, said premium prices to be based on 17 cents for copper, eleven cents for zinc and 9 1/4 cents for lead.

2. That Metals Reserve Company on March 7, 1942, issued a statement in which it sets forth that in effecting the program, as outlined, the said Metals Reserve Company would pay a premium on all domestic production of copper, lead and zinc in excess of monthly quotas established by the War Production Board and the Office of Price Administration and approved by Metals Reserve Company which will reflect the difference between the respective ceiling prices for the materials involved and the equivalent of 17c per pound Connecticut Valley for copper, 9 1/4c per pound New York for lead, and 11c per pound East St. Louis [fol. 17] for zinc; that said statement further provided that "following receipt in each month of its agents' and representative's statements, together with the sworn producers'

affidavits, Metals Reserve Company will arrange for the premium payments to be made promptly to the producers". Thereafter, Metals Reserve Company has paid and continues to pay said premium prices for said ores.

3. That as a condition precedent to receiving premium prices from Metals Reserve Company, a producer must file an affidavit to the effect that it has "produced, and delivered" to the smelter the amount of copper, lead and zinc as listed; that its monthly production quota has been filled and "the amount of material specified therein has been produced, and delivered for sale during the month above mentioned."

4. That the premium prices paid by Metals Reserve Company are paid on account of the production and delivery to the smelter or refinery of the over-quota ores and in contemplation of the subsequent sale of said ores for use in the further and more expeditious prosecution of the war.

5. That the amounts received by the Plaintiff herein from Metals Reserve Company on account of the production and delivery to the smelter of all ores sold in the calendar year, 1943, are part of the "gross amount received for or the gross value of metalliferous ore sold" as set forth in Section 80-5-66, Utah Code Annotated, 1943.

6. That at the time Plaintiff herein filed with Defendant, State Tax Commission, the statement required by Section 80-5-67, Utah Code Annotated, 1943, Plaintiff failed to include therein the amount of the premium prices received from Metals Reserve Company on account of the ores sold during the calendar year 1943; that thereafter and pursuant to Subdivision 5 of said Section 80-5-67, the said Defendant, State Tax Commission, requested Plaintiff to file such information, which Plaintiff failed to do but in lieu thereof, and because it was considered to be approximately [fol. 18] the same sum, Plaintiff filed with the State Tax Commission a statement setting forth the amount of premiums paid to it by Metals Reserve Company for ores produced and delivered to the smelter during the year 1943; that thereupon and pursuant to authority granted by Section 80-5-68, Utah Code Annotated, 1943, the Defendant, State Tax Commission, accepted said amount in the sum of \$3,781,421.55 as being the amount received by said Plaintiff from Metals Reserve Company in connection with the ores

sold by Plaintiff during the year 1943; that subsequently and pursuant to Section 80-5-66, the Defendant, State Tax Commission, lawfully levied and assessed an occupation tax in the sum of \$815,443.35 against the Plaintiff herein.

Wherefore, Defendants Pray judgment that the Plaintiff take nothing by reason of its complaint on file herein but that the same be dismissed with costs.

Grover A. Giles, Attorney General; Arthur H. Nielsen, Assistant Attorney General; W. L. Skauchy, Attorney for State Tax Commission, Attorneys for Defendants.

(Duly Verified.)

Received a copy of the Foregoing Answer this 10th day of October, 1944, 5:15 p. m.

C. C. Parsons, Wm. M. McCrea, A. D. Moffat, Attorneys for Plaintiff.

#### IN UNITED STATES DISTRICT COURT

AMENDED AFFIRMATIVE DEFENSE—Filed October 18, 1944

Come now the Defendants above named and by leave of the court hereby substitute the attached pages numbered 5 to 9 in lieu of Defendants' affirmative defense contained [fol. 19] on Pages 4, 5 and 6 of Defendants' original answer.

Grover A. Giles, Attorney General; Arthur H. Nielsen, Assistant Attorney General; W. L. Skauchy, Attorney for State Tax Commission, Attorneys for Defendants.

Received a copy of the foregoing amended affirmative defense this 17th day of October, 1944.

C. C. Parsons, Attorneys for Plaintiff.

For further and separate defense, Defendants allege as follows:

1. Section 902e of the Emergency Price Control Act of 1942 which became law on January 30, 1942 (Ch. 26, 56 Stat. 23; 50 U. S. C. App., Sec. 901 et seq.) provides that the administrator whenever he determines that the maximum



necessary production is not being obtained or may not be obtained during the ensuing year may, on behalf of the United States, "buy or sell at public or private sale or store or use, such commodities in such quantities and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof or otherwise to supply the demand therefor, or make subsidy payments to domestic producers of such commodity in such amounts and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof: Provided, That in the case of any commodity which has heretofore or may hereafter be defined as a strategic or critical material by the President pursuant to section 5d of the Reconstruction Finance Corporation Act, as amended (Title 15, Sees. 606b, 609j), such determinations shall be made by [fol. 20] the Federal Loan Administrator, with the approval of the President, and, notwithstanding any other provision of this Act or of any existing law, such commodity may be bought or sold, or stored or used, and such subsidy payments to domestic producers thereof may be paid, only by corporations created or organized pursuant to such section 5d (Title 15, Sees. 606b, 609j); except that in the case of the sale of any commodity by any such corporation, the sale price therefor shall not exceed any maximum price established pursuant to subsection (a) of this section which is applicable to such commodity at the time of sale or delivery.

2. Pursuant to authority granted by Sees. 901 and 902 of said Emergency Price Control Act of 1942, the administrator, on April 28, 1942 (7 F. R. 3153 as amended) issued his general maximum price regulation whereby it was provided that no person shall sell or deliver any commodity at a price higher than the maximum price permitted by the regulation (Section 1499.1). Said regulation further provided that the provisions thereof should not apply to such sales and deliveries of commodities as might be specified by supplementary regulations or amendments thereto (Sec. 1499.9). Said general maximum price regulation became effective.

Thereafter, to-wit, on August 12, 1941, and in furtherance of the objects of said Emergency Price Control Act of 1942, the administrator issued his price schedule No. 15 whereby it was provided that on and after February 1, 1942, no per-

son should sell, offer to sell, deliver or transfer copper and no person should buy, offer to buy or accept delivery of copper at a price higher than twelve cents per pound Connecticut Valley provided "that any person may sell or offer to sell, deliver, or transfer copper to Metals Reserve Company or any other government department, agency, or corporation previously approved in writing by the Office of Price Administration, and Metals Reserve Company, or any other government department, agency or corporation so approved by the Office of Price Administration may buy, offer to buy, or accept delivery of copper at prices higher than the maximum prices set forth".

[fol. 21] Subsequently, the administrator of the Office of Price Administration amended the provisions of the General Maximum Price Regulation and particularly Section 1499.9 whereby it was provided that the general maximum price regulation should not apply to "sales or deliveries of metallic copper, lead or zinc to the Metals Reserve Company, or its duly authorized *agents*, or agents, pursuant to the premium price plan announced by the Federal Loan Agency, the War Production Board, and the Office of Price Administration. This amendment became effective May 18, 1942. (7 F. R. 3724).

3. Pursuant to Title 15, U. S. C., Sec. 606b (being the same as Section 5d of the Reconstruction Finance Corporation Act, as amended, 15 U. S. C., Section 606b, 609j) Metals Reserve Company was incorporated on June 28, 1940. (6 F. R., 2970). The Articles of Incorporation thereof, as amended, set forth the objects, purposes and powers of the corporation to be "to produce, acquire, carry, sell, or otherwise deal in strategic and critical materials as defined by the President". (filed Oct. 3, 1941, 6 F. R. 5464).

4. On January 12, 1942, the Honorable Jesse Jones, as Federal Administrator, pursuant to authority granted under Sec. 5d of the Reconstruction Finance Corporation Act, as amended, announced that Metals Reserve Company would pay a higher price for lead, zinc and copper according to a plan to be announced. The statement further provided that any metals "so acquired by the Metals Reserve Company which are not used for or by the government will be subject to your allocation at the ceiling price fixed by the price administrator".

5. On February 9, 1942, a joint statement was issued by the War Production Board and the Office of Price Administration setting forth certain rules and regulations governing the payment of premium prices for over-quota production of copper, lead and zinc. Said statement provides that in accordance with the plan announced, "Metals Reserve Company has announced that it will pay, for a period of two and one-half years beginning February 1, 1942, and ending [fol. 22] July 31, 1944, premium prices for the production of copper, lead and zinc in excess of quotas to be established jointly by the War Production Board and the Office of Price Administration. These premium prices will be based on 17¢ for copper, 11¢ for zinc and 9½¢ for lead".

6. On March 7, 1942, Metals Reserve Company issued its statement which, as subsequently amended, states that in effecting the program as outlined, the said Metals Reserve Company would pay a premium on all domestic production of copper, lead and zinc in excess of monthly quotas established by the War Production Board and the Office of Price Administration and approved by Metals Reserve Company, which will reflect the difference between respective ceiling prices for the materials involved and the equivalent of 17¢ per pound Connecticut Valley for copper, 9½¢ per pound New York for lead, and 11¢ per pound East St. Louis for zinc. Each producer representing himself as eligible for premium payments must "(1) cause the smelting company to which he ships to be furnished, as agent for Metals Reserve Company, with a sworn producer's affidavit (forms thereof can be obtained by the producer from the smelting company) showing, among other things, the amount of material in excess of quota delivered during the month covered by such affidavit for which he has been paid or will be paid and on which he is eligible for a premium, and (2) cause the smelting company to be furnished with all necessary information so as to enable it to supply Metals Reserve Company with a statement setting out all the data required for the making of the premium payments". Said statement further provides that "following receipt in each month of its agents' and representative's statements, together with a sworn producers' affidavits, Metals Reserve Company will arrange for the premium payments to be made promptly to the producers". Thereafter, Metals Re-

serve Company has paid and continues to pay said premium prices for said ores as in said program set forth.

7. The affidavit of the producer requires the producer to certify that it has "produced and delivered" to the smelter [fol. 23] in company during the particular month the quantities of copper, lead and zinc as listed; that its monthly production quota has been filled and the amount of materials specified therein "has been produced and delivered for sale during the month above mentioned, in addition to the amount of materials in excess of quotas produced and delivered as hereinafter listed."

The premium prices paid by Metals Reserve Company to the Plaintiff herein are paid on account of the production and delivery to the smelter as hereinabove set forth of the ores produced in excess of quota. Thereafter, the allocation of said ores is made in accordance with priority ratings as established by the President of the United States pursuant to powers granted by statute (56 Stat. 177, 50 U. S. C. App., Sec. 633).

8. The amounts received by the Plaintiff herein from Metals Reserve Company on account of the production and delivery to the smelter pursuant to the program above outlined of all ores sold in the calendar year 1943, are part of the "gross amount received for or the gross value of metalliferous ore sold" as set forth in Section 80-5-66, Utah Code Annotated, 1943.

9. At the time Plaintiff herein filed with Defendant, State Tax Commission, the statement required by Section 80-5-67, Utah Code Annotated, 1943, Plaintiff failed to include therein the amount of the premium prices received from Metals Reserve Company on account of the ores sold during the calendar year 1943. Thereafter and pursuant to Subdivision 5 of said Section 80-5-67, the said Defendant, State Tax Commission, requested Plaintiff to file such information. Plaintiff thereupon filed with the State Tax Commission a statement setting forth the amount of premiums paid to it by Metals Reserve Company for ores produced and delivered to the smelter during the year 1943, in the sum of \$3,781,421.55. The Defendant, State Tax Commission, thereafter, lawfully levied and assessed an occupation tax in the sum of \$815,443.35 against the Plaintiff herein.

Wherefore, Defendants Pray judgment that the Plaintiff [fol. 24] take nothing by reason of its complaint on file herein but that the same be dismissed with costs.

Grover A. Giles, Attorney General; Arthur H. Nielsen, Assistant Attorney General; W. L. Skanechy, Attorney for State Tax Commission, Attorneys for Defendants.

# IN UNITED STATES DISTRICT COURT

REPORTER'S TRANSCRIPT OF PROCEEDINGS ON PRETRIAL HEARD  
OCTOBER 13, 1944

The Court: What is the issue in this case, gentlemen?

Mr. Parsons: If the Court please, ceiling prices were established for essential metals, essential to the prosecution of the war. The Government found under those ceiling prices the necessary production of essential metals was impossible. Rather than increasing the ceiling prices the Government offered certain subsidies for production of these metals in excess of fixed quotas. In 1943 these subsidies were paid to the plaintiff companies in these two cases. The State Tax Commission then, treating these subsidies as part consideration for sales, applied the mining occupation tax of Utah and taxed those subsidies. The amount of the tax on the subsidies was paid under protest by these companies, and these suits have been instituted to recover back the sums paid.

The two issues involved in the Kennecott Copper case and, so far as I am informed they are the same in your case Mr. Hogan, are these:

First, that the taxation of these subsidy payments is not authorized by Utah law.

Secondly, that this taxation of the subsidies involved was a tax on the very means used by the Federal Government in the prosecution of the war and consequently beyond the [fol. 25] power of the State to make this direct levy upon the Government activities or facilities.

Those are the only two issues in the case.

The Court: Is that a correct statement?

Mr. Nielsen: I think that is a correct statement, your Honor.

The Court: In other words, it is a question of law upon the record?

Mr. Parsons: I would think so. I might say this: counsel have denied quite liberally the allegations of the complaint but I suspect those denials go to our conclusions of law rather than to the facts.

Mr. Nielsen: That is correct, your Honor.

The Court: Can you gentlemen agree upon a record?

Mr. Nielsen: I think we can.

The Court: Setting out what was actually done and with the applicable statute?

Mr. Nielsen: As to what are the applicable statutes, your Honor, the plaintiffs have pleaded certain statutes. The defendant this morning would like to make an amendment to the answer to plead some other statutes or orders which appear in the Federal Register. Whether they are applicable I do not think we can agree.

The Court: I am not asking you to do that. I am asking you if you can put into the record those statutes that either or both of you rely on.

Mr. Parsons: What they are attempting to do is to compile those orders; the statutes of course are available to the Court; the orders may not be, and there are so many of them it is difficult to find them. Our idea is to compile under one cover all the orders applicable to this case.

The Court: What do you mean by orders?

Mr. Parsons: Executive Orders, Presidential orders by authority of the Acts. I think the Court would take judicial notice of those orders.

[fol. 26] The Court: If I only knew what they were.

Mr. Parsons: To assist the Court in that regard I am sure counsel and ourselves can agree upon those orders. We will put them under one cover and submit them in that way.

The Court: Yes, you gentlemen do that when you come in, and copy your statutes too; then we don't have to run to the books.

Mr. Nielsen: In respect to that, the Tax Commission would like to have leave to amend its answer to include therein three additional orders; the first is the Article of Incorporation of Metals Reserves Company which is the



company that pays this premium tax; the second an amendment of the administrator, Office of Price Administration relative to—

The Court: Will it be necessary for you to rewrite your answer?

Mr. Nielsen: No, I don't think so; the affirmative defense part of it, because they come in chronological order, it would be necessary to re-write that.

The Court: No reason why they should not be permitted to put those in the pleading?

Mr. Parsons: I have no objection.

The Court: You can attach it or rewrite that page if you want to.

Mr. Nielsen: We probably would re-write it.

The Court: Re-write it and I will let you substitute it.

Mr. Parsons: That is all right. When can you do this?

Mr. Nielsen: We would like to have until Tuesday if we may serve it on you then.

The Court: When is it set for?

Mr. Nielsen: The 19th.

Mr. Parsons: Can't you get it in Saturday? Only a question of typing; you have it all done haven't you?

[fol. 27] Mr. Nielsen: I hope I have. I think we might get it done tomorrow; I don't know for sure.

The Court: You can get it served on the other side by Monday anyway?

Mr. Nielsen: Yes.

The Court: You get your amendment in by Monday the 16th, then on the 19th when it comes up it will be a question of argument on what the law is.

Mr. Parsons: I think so.

The Court: These two cases are consolidated for trial?

Mr. Parsons: They are consolidated for trial.

#### Certificate

I certify that the within pages numbered from 1 to 5, inclusive, contain a full, true and correct transcript of my shorthand notes of the proceedings on pretrial in the within entitled causes.

E. M. Garnett, Official Reporter.

Filed: Feb. 20, 1943.

## IN UNITED STATES DISTRICT COURT

PRETRIAL ORDER—Filed Oct. 21, 1944

This cause coming on for pretrial on the 13th day of October, 1944, Mr. C. C. Parsons appearing for the plaintiff, and Mr. A. H. Nielsen and Mr. L. W. Skauchy for the defendants,

Now, therefore, upon the statements of counsel for the respective parties as to the issues of law and of fact to be tried, the following summary of said issues is hereby made and ordered filed herein, to-wit:

The issues of law to be determined upon the record are:

(1) Whether or not the taxation of the subsidy payments herein is authorized by Utah law.

(2) Whether or not the taxation of the subsidies herein is a taxation of means used by the Federal Government in [fol. 28] the prosecution of the war and consequently beyond the powers of the State to make this direct levy upon Government activities or facilities.

Tillman D. Johnson, United States District Judge.

## IN UNITED STATES DISTRICT COURT

MINUTE ENTRY—October 27, 1944

On this 27th day of October, 1944, plaintiff, Kennecott Copper Company, appearing by C. C. Parsons, its attorney, and plaintiff Silver King Coalition by R. J. Hogan, its attorney, and defendants by A. H. Nielsen and W. L. Skauchy, its attorneys, and these two cases having been consolidated, came on for trial. The following jury was called, to wit: Stanley L. Day, M. C. Seeley, Allen H. Barber, Vesta Cahoon, Lawrence B. Johnson, David Beesley, Reuben H. Hansen, Lottie M. Ferguson, Mark Eggerston, F. L. Fountain, Wesley M. Lundstrom and Russell B. Waldron, twelve good and lawful persons, and they were duly empaneled and sworn to well and truly try this case and a true verdict render according to the evidence. Certain stipulations were made in open court. The jury were duly cautioned as to their duties during the recess and permitted to separate to meet the court at ten a.m. on October 30th.

The case was then submitted on stipulations. Both sides rest. Each side moved for a directed verdict in its favor in each case, and the Court heard the arguments of counsel until the hour of adjournment, and the further trial of this case was continued until 9:00 A. M. on October 30, 1944.

## IN UNITED STATES DISTRICT COURT

### JUDGMENT

This action having come on regularly for trial beginning October 27, 1944, with plaintiff appearing by C. C. Parsons, its attorney, and defendants by A. H. Nielsen and L. W. Skanchy, its attorneys, and this case was consolidated for purpose of trial with Civil 680, Silver King Coalition Mines Company v. State Tax Commission, et al, and a jury of twelve good and lawful persons was duly empaneled and [fol. 29] sworn to well and truly try this case and a true verdict render according to the evidence. The Jury were excused from the box, and the case was submitted on stipulation. Each side moved for a directed verdict in its favor, and the Court heard the arguments of counsel on said motions, and on October 30th, the jurors resumed their places in the jury box, and were instructed by the Court to return the following verdict in this case:

"We the jury, duly empaneled and sworn in the above entitled cause find the issues joined in favor of the plaintiff and against the defendants, in the sum of \$37,814.22 with interest from May 31, 1944, at 6% per annum, by direction of the Court.

Dated: October 30, 1944. Frank Fountain, Foreman."

Wherefore, it is ordered and adjudged by the Court on this 30th day of October, 1944, that Kennecott Copper Corporation, a corporation, recover of and from defendant, State Tax Commission, et al., the sum of \$37,814.22 with interest from May 31, 1944, at 6% per annum together with its costs herein incurred to be taxed upon a verified cost bill and have execution therefor.

Attest: W. B. Wilson, Clerk.

## IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed Jan. 26, 1945

To the above named Plaintiff, Kennecott Copper Corporation, a corporation, and to C. C. Parsons, Wm. M. McCrea and A. D. Moffat, its attorneys:

Notice is hereby given that the defendants above named hereby appeal to the United States Circuit Court of Appeals for the Tenth Circuit from the judgment entered by the above entitled court on the 30th day of October, 1944, in accordance with a directed verdict of the jury, in favor of the Plaintiff and against the Defendants in the [fol.30] sum of \$37,814.22 with interest from May 31st, 1944 at 6% per annum.

Dated this 26th day of January, 1945.

Grover A. Giles, Attorney General; Arthur H. Nielsen, Assistant Attorney General; W. L. Skanchy, Attorney for State Tax Commission, Attorneys for Defendants.

## IN UNITED STATES DISTRICT COURT

STIPULATION, DISPENSING WITH BOND—Filed Jan. 27, 1945

It is hereby stipulated by and between the parties hereto through their respective attorneys of record that the bond on appeal, or any other bond herein required of the Defendants in connection with their appeal to the United States Circuit Court of Appeals for the Tenth Circuit may be dispensed with and the Defendants, and each of them, are hereby relieved from the necessity of filing any such bond.

Dated this 27th day of January, 1945.

Grover A. Giles, Attorney General; Arthur H. Nielsen, Assistant Attorney General; W. L. Skanchy, Attorney for State Tax Commission, Attorneys for Defendants. C. C. Parsons, Wm. M. McCrea, A. D. Moffat, Attorneys for Plaintiff.

## [fol. 31] IN UNITED STATES DISTRICT COURT

STIPULATION DESIGNATING RECORD ON APPEAL—Filed  
January 27, 1945

It is hereby stipulated by and between the parties hereto through their respective attorneys of record that for inclusion in the transcript of the record on Defendants' appeal herein, the Clerk of this Court shall transmit under his hand and the seal of the Court of the United States Circuit Court of Appeals for the Tenth Circuit the following documents which will then constitute and present the complete record and all of the proceedings and evidence in this action:

1. Complaint.
2. Motion of Defendants to dismiss.
3. Minute Entry of September 26th denying Defendants' Motion to Dismiss.
4. Answer of Defendants.
5. Reporter's transcript of proceedings on Pre-trial held October 13, 1944.
6. Amendment to Defendants' Answer pursuant to permission granted in open court.
7. Order on Pre-trial dated October 21, 1944.
8. Minute Entry of October 27, 1944.
9. Plaintiff's Exhibits 1 and 2 constituting the Stipulation of Facts and the pertinent statutes and orders and announcements of the various federal agencies, or Reporter's transcript thereof.
10. Judgment of the court in accordance with the directed verdict of the jury in favor of the Plaintiff and against the Defendants, dated October 30, 1944.
11. Reporter's Transcript of oral decision rendered October 30, 1944.
12. Notice of Appeal with date of filing.
13. Stipulation Dispensing with Bond.
14. Designation of and stipulation as to the record.
- [fol. 32] 15. Statement of Points Relied on.
16. Clerk's certificate.

Dated this 27th day of January, 1945.

Grover A. Giles, Attorney General; Arthur H. Nielsen, Assistant Attorney General; W. L. Skanchy, Attorney for State Tax Commission, Attorneys for Defendants; C. C. Parsons, Wm. M. McCrea, A. D. Moffat, Attorneys for Plaintiff.

## IN UNITED STATES DISTRICT COURT

STATEMENTS OF POINTS UPON WHICH APPELLANTS INTEND TO  
RELY—Filed February 21, 1945

To the Above Named Plaintiff, Kennecott Copper Corporation, a Corporation and to C. C. Parsons, Wm. M. McCrea, and A. D. Moffat, Its Attorneys:

You are hereby notified that the defendants and each of them intend to rely upon the following points in connection with their appeal from the judgment entered by the above entitled court on the 30th day of October, 1944.

(1) Error of the court in refusing to grant defendants' Motion to Dismiss the Action, upon the grounds as stated in said Motion.

(2) Error of the court in denying defendants' Motion for a Directed Verdict in said cause on the evidence and facts presented to the court by the parties.

(3) Error of the court in granting plaintiff's Motion for [fol. 33] a Directed Verdict on the evidence and facts presented to the court by the parties.

Grover A. Giles, Attorney General; Arthur H. Nielsen, Assistant Attorney General; W. L. Skanechy, Attorney for State Tax Commission, Attorneys for Defendants.

Received a copy of the foregoing this 21st day of February, 1945.

C. C. Parsons, Wm. M. McCrea, A. D. Moffat, Attorneys for Plaintiff.

Clerk's Certificate to foregoing transcript omitted in printing.



**Reporter's Transcript****Appearances:**

Mr. C. C. Parsons, Attorney for Plaintiff; Mr. A. H. Nielsen, Mr. L. W. Skanchy, Attorneys for Defendants.

Salt Lake City, Utah,  
October 27, 1944.

Before Honorable Tillman D. Johnson, Judge, and a Jury

(A jury of twelve good and lawful persons was called, examined, chosen and sworn herein.)

The Court: Are you gentlemen submitting this case on a stipulation of some sort?

Mr. Parsons: Yes, your Honor.

The Court: Would you read the stipulation.

Mr. Parsons: The stipulation is quite lengthy; I presume it would take an hour to read it. May I suggest it be introduced in evidence and in the course of our argument we will refer to the facts that are relevant here.

The Court: Well, if you gentlemen will stand up here and agree, and one supplement the other, I would just as soon you would state it as read it.

Mr. Nielsen: State it as we go along, yes.

The Court: Go ahead and summarize it then.

Mr. Parsons: This stipulation of facts was made in the course of the protest by the mining companies to the State Tax Commission when the State Tax Commission undertook to apply the net proceeds tax statute and occupation tax statute to these subsidy or premium payments. It reviews the manner of operation of the mining company, the establishment of the quotas beyond which this excess production earns the premium or subsidy payment. It describes also the procedure of the Government in the making of these subsidy payments.

The Court: Was that a regulation or a statute?

Mr. Parsons: Both. The authority comes from the statute [fol. 35] and the regulation was pursuant to that statutory authority.

I think that generally relates the contents of this stipulation.

The thought we had in mind was we would have the stipulation identified as an exhibit and offer it and then it becomes part of the record. And as a second exhibit we would offer the compilation of statutes, directives, pronouncements, that in any possible way could have some relevancy to the issues involved here,—that for the convenience of the Court. The matters stated in that compilation are matters of which the Court would take judicial notice. That would complete our record. Then all the parties would rest; we would make a motion for directed verdict and proceed to argue the case on that motion.

The Court: All right, let them be marked and filed.

Mr. Nielsen: That is agreeable.

(Exhibit 1 was thereupon marked by the reporter).

Mr. Parsons: The stipulation of facts to which I have referred has now been identified as Exhibit 1. This we offer as the facts—constituting the record of the facts in the two cases here consolidated for trial.

The Court: It may be received.

(Said Exhibit 1 offered and received in evidence is attached to the original of this transcript, and a copy of same as furnished by counsel is attached to the copy of this transcript filed herein.)

(Exhibit 2 marked by the reporter.)

Mr. Parsons: The compilation of statutes, executive orders and directives and official pronouncements to which I have also referred is now identified as Exhibit No. 2. This we offer for the convenience of the Court.

The Court: It may be received for that purpose.

(Said Exhibit 2 offered and received is attached to the original of this transcript, and a copy of same as furnished by counsel is attached to the copy of this transcript filed herein.)

[fol. 36] Mr. Parsons: The plaintiff Kennecott Copper Corporation rests.

Mr. Hogan: The Silver King Coalition Mines Company rests.

The Court: Both sides rest?

Mr. Nielsen: Both sides rest.

The Court: Make your motions then and put them in the record.

Mr. Parsons: The plaintiff in the case of Kennecott Copper Corporation against the State Tax Commission and others, Civil No. 671, moves the Court for an order directing the jury to return verdict for the plaintiff on the following grounds:

(1) It is conclusively established by the uncontradicted evidence that the deduction of the subsidy payments herein involved and here complained of was not authorized by Utah law.

(2) It is conclusively established by the uncontradicted evidence that the deduction of the subsidies herein is a deduction of the very means employed by the Federal Government to successfully prosecute the war and is beyond the power of either the statute or of these defendants to make this direct levy upon the activities or instrumentalities of the Federal Government.

The Court: You make that in behalf of both?

Mr. Hogan: The Silver King Coalition Mines Company in Civil No. 680 concurs in the motion.

The Court: You join in the making of the same motion in behalf of your client?

Mr. Hogan: That is right.

Mr. Nielsen: At this time the defendant feels that it also should make a motion for directed verdict in this matter upon the grounds:

(1) That which was alleged in their motion to dismiss, that the court has no jurisdiction of this matter, and [fol. 37] (2) Upon the ground that the evidence before the Court conclusively shows that the tax here in question was validly assessed by the State Tax Commission. The evidence does not support the complaint and claims of the plaintiff in each case.

The Court: That is in both complaints,—both suits?

Mr. Nielsen: Yes, if your Honor please.

The Court: Ladies and gentlemen of the jury, there is no use in keeping you here to listen to the argument unless you want to stay; so while you are out of the court room do not talk about this case or let anybody talk to you about it, and do not form or express any opinion as to the merits of it.

You can be excused until Monday morning at 10 o'clock.

The Court: I will listen to you gentlemen in any order of the argument you want to agree upon.

Mr. Parsons: I presume the burden is upon the plaintiff and I should proceed.

The Court: It would be on your motion, yes.

(Whereupon motions for a directed verdict were argued by counsel for the respective parties), and the further hearing of said cause was adjourned to 9 A. M. Monday, October 30, 1944)

#### REPORTER'S TRANSCRIPT OF ORAL DECISION OCTOBER 30, 1944

The Court: The decision of these cases depends upon the meaning and fair interpretation of the State and the United States statutes applicable to the situation.

These various statutes have been read and re-read during the progress of this discussion, and I will not have them re-read at this time, but they may be considered incorporated in the remarks that I shall make respecting the cases.

In this connection I will say that a taxing body, such as the Utah State Tax Commission, is charged with the duty of collecting all taxes that may be properly assessed and [fol. 38] collected under the laws of the State, and it becomes its duty as such to solve powers that are doubtful in favor of the State. That is the universal practice, so far as I have observed, of all taxing bodies, including the revenue department of the United States. So that it results in many cases an appeal must be made to the courts to determine what is the proper meaning and construction of the statutes under which taxes have been levied and assessed. That is the case here.

The State statute provides for the collection of an occupation tax on the gross sales or value of the metals produced by mining companies, and so in these cases the State Tax Commission has proceeded to levy assessments upon the gross amounts which it claims has been paid to or received by the respective mining companies covering the period involved, and which assessments have been paid under protest by plaintiff companies.

The tax or levy in these cases has this anomaly: for the bulk of the metal values produced it is agreed, using copper as an illustration, that it has a valuation or sales

price of twelve cents a pound—the relative proportion of these two prices I am unable to state offhand—but for that which was produced in excess of this twelve cents per pound price they are here claiming a price of seventeen cents, resulting from a payment made, not by the purchasers of the metals in question, but by the United States Government.

I just asked counsel for the State Tax Commission whether that extra, additional payment was made for the benefit of the purchasers of these metals, or for the benefit of the seller of the metals. Not holding him to his answer, I am, however, of the opinion that he answered correctly when he said it was for the benefit of the sellers, that is to say, of the plaintiffs in these actions.

So that we have this question submitted for determination: Was that extra five cents per pound for this additional production any part of the purchase price or the sales price of these metals?

Certainly, so far as the relation between the purchaser and the seller or the Government is concerned, it constituted no bargain contract price, or part of the price. Then what was it?

To that I think we must look to the statutes of the United States. The State of Utah, neither by its Legislature nor by its Tax Commission, can say what the United States Government shall do with its own money. That is a matter that must be determined by Congress, and its determination of that question is final and conclusive upon all the courts of the nation, State and National.

Now what was the purpose of Congress in enacting this sort of legislation providing for the payment of this particular subsidy?

The Statute itself does not recite, but it does contain the word "subsidy", and subsidy, speaking generally, is something, usually money, donated or given or appropriated by the Government through its proper agencies,—in this country by the Congress. Congress may, and has as here, in these wartimes used many sub-agencies of the Executive Department to carry out the laws enacted by it.

Now, what did Congress mean and intend when it authorized the payment of subsidies under the conditions specified in the Act? Was it appropriated for the purpose of relieving the buyers of the products or metals indicated

from the payment of the market value of the metals in question?

In that connection we must bear in mind that Congress has authorized the Price Control Administrator to make and fix ceiling prices on practically all articles in use in this country. In these cases the Administrator fixed prices at which these metals could be sold, copper for instance, at twelve cents a pound. Now these prices, whatever they may be in any particular case, we must presume were based upon a fair consideration of what would be a fair and just price to be received and paid for the article in question. Can we say that the fixing of the price of copper was a mere subterfuge on the part of the Administrator, and that the real price that he should have fixed, if he had been honest about it, was seventeen cents? Such a construction given to his acts would be to question his honesty, it seems to me. [fol. 40] Twelve cents per pound for copper when it was fixed we must accept as the fair market value to be paid for this metal and to be received by the producer of it, and with respect to the bulk of the production in these cases the producer did not receive and the purchaser did pay that price. Now the Government, for its own reasons, and without consulting the Legislature of the State of Utah or its Tax Commission, made these extra and additional payments, and the Congress called it a subsidy, which by its very terms means a gift from the Government to these producers. True when it is paid, it is money received and used by the producers, like they use any other money, and it might very well be that in the determination of income the courts, in the construction of an income statute or the Congress in making such payment, may be held to have intended that the States, or the Government itself, should include that payment in the amount upon which income taxes should be assessed. But this is not an income tax. This is an occupation tax upon the gross sales of these metals by these producers, and who are paid money as a subsidy by the United States.

It is recited and reiterated by some of the Government representatives who have written about this matter, that these payments were made to meet the additional cost and expense that would be incurred by producers in making this extra effort to add to its product. Well, I am inclined to the view that these gentlemen were entirely right in that



construction of the statute as to the purpose which Congress had in authorizing these subsidy payments.

In my view of the situation it would be, and is, a strained construction to make these payments, although based upon five cents, or some other amount, per pound for the metal in question, a part of the purchase price so as to bring it within the terms and meaning of the State statute under which the Tax Commission in these cases has acted.

In that connection, however, I want to repeat that I have no criticism to make of the Tax Commission in raising this question. It is the duty of the Tax Commission to collect all the taxes that are authorized under the State statute, and if it had any doubt about it, it solved it by levying this tax, and with these resulting law suits. But I am very [fol. 41] clearly of the opinion that neither the State statute nor the Federal statutes give the Tax Commission any authority whatever to make these levies and collections.

You may call the jury into the box.

(Jury called in.)

The Court: Will you prepare a form of verdict Mr. Clerk.

I will state to the jury that the court, after listening to the argument of counsel and being as fully advised as may be, is of the opinion that the plaintiffs in these actions are entitled to judgment as prayed for:

What is the Amount you are suing for?

Mr. Parsons: Ours is \$37,000 some odd dollars.

Mr. Hogan: Ours is \$4533.54.

The Clerk: Insert that in the verdict?

The Court: Write it in the verdict.

The Clerk: The Copper Company's is what?

Mr. Parsons: \$37,814.22, with interest from the date of payment.

The Court: I do not know whether you are entitled to interest or not. I doubt very much that you are entitled to interest.

Mr. Parsons: Your Honor has given it to us in the past.

Mr. Hogan: I think the statute provides for it,—the State Statute.

The Court: If it provides for it. Interest from what?

Mr. Parsons: From the date of payment.

The Court: Is that right?

Mr. Nielsen: That is correct, your Honor.

The Court: Do you want them to figure out the interest, or write it in: with interest from—

Mr. Parsons: I would just write it in, with interest from the date at six per cent per annum.

[fol. 42]. The Court: In the old days that form of verdict has been criticised, where you leave it to the clerk to count interest instead of the jury. Can you not count the interest shortly? It imposes a duty on the clerk he should not be required to perform.

Mr. Parsons: With interest from the date of payment; I will have to give you that date.

The Court: Amounting to what sum?

Mr. Parsons: Together with interest thereon at the rate of six per cent per annum from the 31st day of May, 1944.

The Clerk: May 31st, 1944, at six per cent?

Mr. Parsons: At six per cent per annum.

The Clerk: By the direction of the Court.

Mr. Parsons: Do you want to check the amount? \$37,814.22.

Mr. Hogan: Ours is \$4,533.54, interest from July 29, 1944.

The Court: Are these forms now satisfactory to counsel?

Mr. Hogan: Yes, your honor.

The Court: One of your number will sign the verdict, at the direction of the court, finding for the plaintiffs in the amounts indicated in the verdicts.

Read the verdicts.

(Verdicts read by the Clerk.)

The Court: You may be excused, and take your places in the lobby of the court room.

#### Certificate

I certify that the within pages numbered from 1 to 7 inclusive, contain a true and correct transcript of my shorthand notes of the oral decision of the Court herein, as approved by the Court for release under the Rule.

E. M. Gannett, Official Reporter.

Filed in United States District Court, District of Utah, Feb. 20, 1945. V. P. Ahlstrom, Clerk. By J. Reed Stewart, Deputy.

[fol. 43]

## Certificate

I certify that the within pages numbered from 1 to 16 inclusive, contain a full, true and correct transcript of my shorthand notes of the proceedings therein recorded in the within entitled cause.

E. M. Gannett, Official Reporter.

Dated at Salt Lake City, February 21, 1945.

## EXHIBIT No. 1

## Stipulation of Facts

Before the State Tax Commission of the State of Utah

In the Matter of the Mine Occupation Tax assessed by the State Tax Commission of Utah against the Mining Companies hereinafter named and becoming due and payable on or before the 1st day of June, 1944; and

In the Matter of the Assessment by the State Tax Commission of the Metalliferous Mines and Mining Claims of said Mining Companies for the year 1944.

The State Tax Commission of Utah, hereinafter called "Commission" and the several Mining Companies that have caused this Stipulation to be executed, as indicated below, hereinafter called "Mining Companies" hereby stipulate and agree as follows:

1. That the Commission, purporting to be acting under the provisions of Sections 80-5-66 and 80-5-72, Utah Code Annotated, 1943, has notified said Mining Companies that their respective Mine Occupation Taxes, due June 1, 1944, have been fixed by said Commission and of the amount thereof.

2. That in fixing the amount of said Occupation Taxes said Commission has included as part of the "gross amount received for, or the gross value of metalliferous ore sold" during the year 1943, the amounts received by said Mining Companies, respectively, from Metals Reserve Company as premiums on account of the production of ores by said Mining Companies in excess of quotas established jointly by [fol. 44] the War Production Board and Office of Price

Administration, approved by said Metals Reserve Company and allotted to said Mining Companies, respectively.

3. That each of said Mining Companies, within the time allowed by law, applied to said Commission by written Petition for a hearing and correction of the amount of the tax so assessed against it, and in each such Petition there were set forth the reasons why such hearing should be granted and the amount by which such tax should be reduced.

4. That said Commission has also notified said Mining Companies that the Net Proceeds Valuation of their mining properties for the year 1944, has been arrived at by including in "Net Annual Proceeds" the amounts received by said Mining Companies from Metals Reserve Company as premiums on account of such over-quota production of ores.

5. That each of said Mining Companies likewise, within the time allowed by law, filed with said Commission written objections to the assessment so made, protesting the inclusion of such premium payments in computing net proceeds and asking for a hearing before the Commission, and that the assessment of its mining properties be reduced by excluding from the Net Proceeds Valuation thereof the aggregate amount of premium payments received by such Company.

6. The issues before the Commission are:

(a) Whether, in fixing the Mine Occupation Tax payable by said Companies, respectively, premium payments received from Metals Reserve Company during the year 1943 are properly includable as part of the "gross amount received for, or the gross value of metalliferous ore sold" during said year.

(b) Whether, in computing Net Annual Proceeds for the purpose of assessing the mining properties of said Companies for the year 1944, such premium payments received by them during the year 1943 are properly includable as part of the "gross proceeds realized during the preceding calendar year from the sale or conversion into money or its equivalent of all ores from such mine or mining claim \* \* \*".

[fol. 45] 7. Executive Order No. 8734 of the President, promulgated April 11, 1941, as amended by Executive Order

No. 8875 of the President, promulgated August 28, 1941, reads in part (and so far as material here) as follows:

“(Purposes)”

“By virtue of the authority vested in me by the Constitution and the statutes, and in order to define further the functions and duties of the Office for Emergency Management with respect to the national emergency as declared by the President on September 8, 1939, for the purposes of avoiding profiteering and unwarranted price rises, and of facilitating an adequate supply and the equitable distribution of materials and commodities for civilian use, and finding that the stabilization of prices is in the interest of national defense and that this Order is necessary to increase the efficiency of the defense program, it is hereby ordered:

(Administrator)

“1. There shall be in the Office for Emergency Management of the Executive Office of the President an Office of Price Administration, at the head of which shall be an administrator appointed by the President. The Administrator shall receive compensation at such rate as the President shall determine and, in addition, shall be entitled to actual and necessary transportation, subsistence, and other expenses incidental to the performance of his duties.

(Powers)

“2. Subject to such policies, regulations, and directions as the President may from time to time prescribe, and with such advice and assistance as may be necessary from the other departments and agencies of the Federal Government, and utilizing the services and facilities of such other departments and agencies to the fullest extent compatible with efficiency, the Administrator shall:

(Price Control)

“a. Take all lawful steps necessary or appropriate in order (1) to prevent price spiraling, rising costs of living, profiteering, and inflation resulting from market conditions [fol. 46] caused by the diversion of large segments of the Nation's resources to the defense program, by interruptions to normal sources of supply, or by other influences growing out of the emergency; (2) to prevent speculative

accumulation, withholding, and hoarding of materials and commodities; (3) to stimulate provision of the necessary supply of materials and commodities required for civilian use, in such manner as not to conflict with the requirements of the War, Navy and other departments and agencies of the Government, and of foreign governments, for materials, articles, and equipment needed for defense (such requirements are hereinafter referred to as 'military defense needs'); and (4) after the satisfaction of military defense needs to provide, through the determination of policies and the formulation of plans and programs, for the equitable distribution of the residual supply of such materials and commodities among competing civilian demands.

#### (Investigation)

"b. Make studies of the Nation's civilian requirements for materials and commodities, the supply of goods and services, the status and trend of prices and factors thereof, and the impact of the defense program upon civilian living standards; exercise the powers of the President in requesting such studies pursuant to Section 336(a) of Title III of the Tariff Act of 1930 (Title 19, U. S. C., Sec. 1336(a)); and conduct such investigations, hold such hearings, and obtain such reports as may be necessary or desirable to carry out this Order.

#### (Prices)

"c. Determine and publish, after proper investigation such maximum prices, commissions, margins, fees, charges, or other elements of cost or price of materials or commodities, as the Administrator may from time to time deem fair and reasonable; and take all lawful and appropriate steps to facilitate their observance."

#### (Exercise President's Powers)

"4. Perform the functions and exercise the authority vested in the President by the following named Acts, in so [fol. 47] far as and only to the extent that the authority conferred by such Acts will, in the opinion of the Administrator, enable him to carry out and secure compliance with the provisions of Section 2a and 2c of this Order: Section 713(a)-7 of Title 15, U. S. C., Supp. V; Section 4 of the Act



approved June 7, 1939 (Title 50, U. S. C., Supp. V., Sec. 98c); and Section 5 of the Reconstruction Finance Corporation Act, as amended by the Act approved June 25, 1940 (Public No. 664, 76th Congress); subject to the disapproval by the Secretary of War or the Secretary of the Navy of each proposed action thereunder.

8. On August 12, 1941, Price Schedule No. 15 was issued by the Administrator of the Office of Price Administration, and so far as material here, reads as follows:

### "Copper

#### (Text of Schedule)

"The Office of Price Administration is charged with the maintenance of price stability and the prevention of undue price rises and price dislocation. Copper is a basic material for the production of many defense products and as such has been subjected to a method of complete control of its distribution by a General Preference Order of the Office of Production Management, No. M-9-a, effective August 2, 1941. In order to equalize the price to all consumers under that preference order and in the interest of national defense and of the public, the establishment of maximum prices for copper is necessary. On the basis of information furnished by the Trade and secured by independent investigation by Office of Price Administration, I find that the maximum prices set forth below constitute reasonable limitations on the price of copper.

"Therefore, under the authority vested in me by Executive Order 8734, it is hereby directed that:

"Maximum prices for copper. (a) On and after February 1, 1942, regardless of the terms of any contract of sale or purchase, or other commitment, except as provided in Section 1309.53 of this chapter, no person shall sell, offer to sell, deliver or transfer copper and no person shall buy, [fol. 48] offer to buy, or accept delivery of copper at prices higher than the maximum prices set forth in Appendix A hereof, incorporated herein as Section 1309.60: Provided, that any person may sell, offer to sell, deliver or transfer copper to Metals Reserve Company or any other government department, agency or corporation previously approved in writing by the Office of Price Administration, and

Metals Reserve Company or any other government department, agency or corporation so approved by the Office of Price Administration may buy, offer to buy, or accept delivery of copper at prices higher than the maximum prices set forth in Section 1309.60."

"Less than maximum prices. Lower prices than those set forth in Section 1906.60 may be charged, demanded, paid or offered."

"Evasion. The price limitations set forth in Price Schedule No. 15 shall not be evaded whether by direct or indirect methods in connection with a purchase, sale, delivery, or transfer of copper, alone or in conjunction with any other material, or by way of any commission, service, transportation, or other charge or discount, premium, or other privilege, or by tying agreement or other trade understanding or otherwise.

"Records and reports. Every person making purchases or sales of copper after August 12, 1941, shall keep for inspection by the Office of Price Administration for a period of not less than one year complete and accurate records of: (a) each such purchase or sale, showing the date thereof, the name and address of the buyer and the seller, the price paid or received, and the quantity in pounds or tons of each kind or grade purchased or sold; and (b) the quantity in pounds or tons, of copper (i) on hand, and (ii) on order, as of the close of each calendar month. Persons affected by Price Schedule No. 15 shall submit such reports to the Office of Price Administration as it may, from time to time, require."

Appendix A to said Price Schedule No. 15, so far as material here, reads as follows:

[fol. 49] "Appendix A. Maximum prices. (a) Maximum base price for copper except casting copper. The maximum base price for copper delivered in carload lots at Connecticut Valley points shall be 12 cents per pound. This maximum base price is for electrolytic, lake or other fire refined copper in the shape of wire bars or ingot bars made to meet either the American Society of Testing Materials Stand-

ard specifications, B5-27 for electrolytic or B4-27 for lake copper. ((a) as amended July 27, 1942.)

“(b) Maximum base prices for casting copper.

Amount of Shipment	Price (f.o.b. shipping point)
20,000 pounds or more	11 <sup>3</sup> / <sub>4</sub> c per pound
Less than 20,000 pounds	12c per pound

“These maximum base prices are for casting copper in the shape of ingot bars or small ingots made by fire refining to a standard of 99.5 per cent pure including silver as copper.

“(b), as amended April 16, 1942)

“(c) Differentials for copper of other kinds or grades or in other shapes or forms. For copper of any other kind or grade or in any other shape or form than that set forth in paragraph (a) or (b) of this section, the maximum price shall be the applicable maximum base price set forth in paragraph (a) or (b) of this section plus or minus the premium or discount for copper of such kind or grade, or in such shape or form which would customarily have been added to or subtracted from the base price on August 11, 1941.

“(d) Differentials for delivery of copper in carload lots at points other than Connecticut Valley points. For copper, except casting copper, delivered in carload lots at any point other than a Connecticut Valley point the maximum price shall be the maximum base price set forth in subsection (a) of this section, as adjusted pursuant to paragraph (c) of this section, plus or minus the delivery differential which on August 11, 1941, would customarily have been added to or subtracted from the base price.”

[fol. 50] 9. On January 13, 1942, the Administrator issued Price Schedule No. 69 which, so far as material here, reads as follows:

“Primary Lead

(Text of Schedule)

“The Office of Price Administration is charged with the maintenance of price stability and the prevention of undue price rises and price dislocations.

"Military and essential civilian demands upon the supply of lead have become increasingly heavy. The present supply of lead will not suffice to meet these needs, and imports are threatened. The combination of increased demand and insufficient supply threatens a bidding up of the price of lead, which will materially increase the cost of the war effort and tend to create an inflationary price spiral.

"Such specifications and standards as are used in this regulation were, prior to such use, in general use in the trade or industry affected.

"Accordingly, under the authority vested in me by Executive Order No. 8734, it is hereby directed that:

"Maximum prices for primary lead. On and after January 15, 1942, regardless of the terms of any contract of sale or purchase, or other commitment, no person shall sell, offer to sell, deliver or transfer primary lead, and no person shall buy, offer to buy, or accept delivery of primary lead in the course of trade or business at prices higher than the maximum prices set forth in Appendix A hereof, incorporated herein as Section 1355.9; Provided, That any person may sell, offer to sell, deliver or transfer primary lead to the Metals Reserve Company or any other government department, agency, or corporation previously approved in writing by the Office of Price Administration, and Metals Reserve Company or any other government department, agency or corporation so approved by the Office of Price Administration, may buy, offer to buy, or accept delivery of primary lead without regard to the provisions of Revised Price Schedule No. 69. (1355.1 as amended September 4, 1943, effective September 10, 1943, OPA-3047.)"

[fol. 51] Said Schedule contained in addition, provisions identical with those of Price Schedule No. 15 respecting acceptance of lower prices; evasion of price limitations; and making and keeping of records and reports.

Appendix A to said Price Schedule No. 69 fixed the maximum price for common lead at 6½¢ per pound.

10. On January 28, 1942 the Administrator issued Price

Schedule No. 81 which, so far as material here, reads as follows:

“Primary Slab Zinc ;

(Text of Schedule)

“The Office of Price Administration, being charged with the maintenance of price stability and the prevention of undue price rises and price dislocations, has determined that the establishment of maximum prices for primary slab zinc is essential in order to accomplish these purposes and is in the interest of national defense and the national welfare.

“The present supply of zinc does not suffice to meet both military and essential civilian needs. The combination of increased demand and insufficient supply threatens the stability of the price of zinc, any increase in which is reflected in the cost of the war effort and tends to contribute to an inflationary spiral. Primary producers, recognizing the importance of these factors to the national welfare, have cooperated with the Office of Price Administration in preventing increases in slab zinc prices charged by them. However, because of the stringency of the supply situation, zinc sales have taken place during recent months at prices considerably in excess of those approved by the Office of Price Administration.

“After careful investigation and consultation, it has been determined that the maximum prices set forth herein are fair and reasonable.

“Accordingly, under the authority vested in me by Executive Order No. 8734, it is hereby directed that:

“Maximum prices on sales of primary slab zinc. On and after January 29, 1942, regardless of the terms of any contract of sale or purchase, or other commitment, no person shall sell, offer to sell, deliver or transfer primary slab zinc, and no person shall buy, offer to buy, or accept delivery of primary slab zinc in the course of trade or business, at prices higher than the maximum prices set forth in Appendix A hereof, incorporated herein as Section 1203.59: Provided, That any person may sell, offer to sell, deliver or transfer primary slab zinc to the Metals Reserve Company or any other government department, agency or corporation approved in writing by the Office of Price Ad-

ministration and Metals Reserve Company or any other government department, agency or corporation so approved by the Office of Price Administration, may buy, offer to buy, or accept delivery of primary slab zinc without regard to the provisions of Revised Price Schedule No. 81, (1306.51 as amended September 4, 1943, effective September 10, 1943.)"

Said Schedule contained in addition, provisions identical with those of Price Schedule No. 15 respecting acceptance of lower prices; evasion of price limitations; and making and keeping of records and reports.

Appendix A to said Price Schedule No. 81 fixed the maximum price for primary slab zinc (prime Western) at 8.25¢ per pound.

11. Metals Reserve Company is a corporation duly created by Reconstruction Finance Corporation pursuant to Section 5d of the Reconstruction Finance Corporation Act, as amended, and is an agency of the United States Government.

12. On February 9, 1942 a joint statement was issued by War Production Board and Office of Price Administration (P.M.2458) setting forth the rules and regulations governing payment of premium prices for over-quota production of copper, lead and zinc. Said joint statement, so far as material here, read as follows:

#### "Joint Statement" WPB-OPA

##### Premium Price Plan for Copper, Lead and Zinc

"The expansion of the armament program following the entry of the United States into the war has made it imperative that unusual steps be taken to increase further the output of copper, lead and zinc because of their prime importance in the production of armaments."

"The premium price plan has been established to make it possible quickly to increase production by mining low grade submarginal ores, and to develop additional ore reserves."

"Particular attention is called to the fact that premium prices will apply to all over-quota production after Feb-



ruary 1, 1942, regardless of the time when tonnage quotas are announced and actual payments begin. By continuing meanwhile to ship through ordinary channels producers will be assured premium prices for over-quota production."

"The principal rules and regulations are as follows:

"1. The premium price plan is one of the steps taken to increase production. In accordance with this plan, the Metals Reserve Company has announced that it will pay, for a period of 2½ years beginning February 1, 1942, and ending July 31, 1944, premium prices for the production of copper, lead and zinc in excess of quotas to be established jointly by WPB and OPA. These premium prices will be based on 17 cents for copper, 11 cents for zinc and 9½ cents for lead.

"2. The premium price plan went into operation February 1, 1942. Regardless of the time at which tonnage quotas are announced and regardless of the time at which actual payments under the plan begin, premium payments shall be made for all over-quota production in February and subsequent months.

"3. A joint committee from the War Production Board and the Office of Price Administration shall fix initial quotas.

"4. Quotas shall be established for particular mines or groups of mines herein referred to as a 'property', and shall be expressed in terms of a property's monthly rate of production. A property's production shall be included in determining its quota and over-quota production regardless [fol. 54] of whether that product is converted into metals, metal oxides or other products.

"5. There shall be five distinct classes of quotas:

- (A) Zero quotas.
- (B) Intermediate.
- (C) 100% quotas.
- (D) Special quotas between zero and 100%.
- (E) Special quotas in excess of 100%.

(A) Zero Quotas.

Any property which had (1) no production or (2) production during 1941 of 200 tons or less of any metal, shall have a zero quota for such metal, except as provided in (E) below.

(B) Intermediate Quotas Between Zero and 100% Quotas.

Any property, except as provided in (E) below, which during 1941 produced more than 200 tons but less than 600 tons of any metal, shall have a quota for such metal based upon a figure obtained by deducting 200 tons from the 1941 output of such metal, and multiplying the remainder by  $1\frac{1}{2}$ . The resultant figure shall be divided by 12 to arrive at the property's monthly quota.

(C) 100% Quota.

Any property, except as provided in (D) or (E) below, which during 1941, produced more than 600 tons of any metal shall have a quota for such metal equal to the property's 1941 rate of production of that metal. A property's 1941 rate of production of any metal shall be determined by dividing its production of that metal for the year by the number of weeks during which the property was in operation, multiplying the resultant figure by 52 in order to translate a partial year's production into a yearly rate, and dividing by 12 in order to arrive at a monthly rate to be used for quota purposes.

(D) Special Quotas Less Than 100%.

In special cases a property may be assigned a quota less than 100% of its 1941-monthly rate of production.

[fol. 55] (E) Special Quotas in Excess of 100%.

In the case of certain properties, special quotas higher than 1941 production will be established, based upon the tonnages which can reasonably be expected to be produced from such properties at the established ceiling price for each metal—i. e., 12 cents for copper, 8.25 cents for zinc, and 6.50 cents for lead. Likewise, persons and companies which did not operate certain mining properties during 1941 but had plants under way to operate them may be assigned quotas on such properties higher than zero. All those for whose properties such special quotas are being considered have already been notified.

"6. Should any property fail to maintain its quota production in any month or months, premium payments will not be made until the accumulated deficit is made up by over-quota production in subsequent months. Material deficits due to major calamities such as floods or fires will not be so accumulated. If conditions develop which make it impossible for the quota production of a property to be maintained, the government will consider applications for reduction of the quota. However, the government reserves the right to restore any initial quota which has been reduced."

13. Pursuant to such rules and regulations a joint committee for the War Production Board and Office of Price Administration, known as the "Quota Committee", was appointed and that Committee fixed quotas for the properties of the various Mining Companies, parties to this Stipulation. Such quotas have been approved by Metals Reserve Company.

14. Quotas are established on a monthly basis and premiums are paid for production of ore in any month in excess of the established quota, except that if in any month there is a deficiency, this deficiency must be made up in the succeeding month or months. In the determination and fixing of initial quotas by the Quota Committee, neither costs of production nor profits are taken into account. In certain cases where operation of producing properties show that production of lead or zinc cannot be increased or maintained without substantial expenditures for greatly increased development work, rehabilitation of underground workings or [fol. 56] additional facilities, provision has been made for the payment of additional premiums in excess of "A" quotas announced on February 9, 1942. The additional premiums were announced by Metals Reserve Company on March 5, 1943, and in these cases, the initial quotas are revised and an additional quota or quotas are assigned which are known as "B" and "C" quotas. From data supplied by the producer showing such expenditures and increased costs of production, "B" and "C" quotas are established which are intended to supply additional premiums to the extent necessary to provide an adequate operating margin. After quotas are established, premium payments are made solely upon the basis of production in excess of allotted quotas.

On June 18, 1943, Metals Reserve Company announced its

plan for paying a Special Additional Premium for copper in addition to the regular premium for those mines which produced less than 2,000 tons of copper during 1942 and which require increased revenue to obtain maximum production. The revised quotas providing for additional premiums for lead and zinc and Special Additional Premium for copper are subject to cancellation by Metals Reserve Company upon thirty days' notice.

15. Premium payments are made on the basis of certain stated percentages of total metal contents of ores, concentrates or other qualified materials, such percentages having been specified by Metals Reserve Company based upon normal metal recovery from such ores, concentrates or other qualified materials. The percentages fixed by Metals Reserve Company may or may not be the same as fixed under mine-smelter contracts, mill-smelter contracts or mine-mill contracts.

16. On March 7, 1942, Metals Reserve Company issued a statement which, as revised January 20, 1943, reads as follows:

March 7, 1942  
(Revised 1-20-43)

**Program for Premium Payments by Metals Reserve Company on Production of Copper, Lead and Zinc in Excess of Monthly Production Quotas.**

In effecting the program originally announced by the [fol. 57] Honorable Jesse H. Jones on January 12, 1942, Metals Reserve Company will pay a premium on all domestic production of copper, lead and zinc in excess of monthly quotas established by the War Production Board and the Office of Price Administration and approved by Metals Reserve Company, which will reflect the difference between the respective ceiling prices for the materials involved and the equivalent of 17¢ per pound Connecticut Valley for copper, 9 1/4¢ per pound New York for lead, and 11¢ per pound East St. Louis for zinc. With respect to excess production of Tri-State District concentrates (which are being handled under separate arrangement, as explained later herein), the premiums to be paid, on the basis of the present ceiling prices, are \$29.70 per dry ton for 60% zinc sulphide concentrates and \$41.80 per dry ton for 80% lead concentrates, respectively, with an adjustment of five cents (5¢)

for each change of one-tenth of one percent (.1%) in grade above and below 60%, as to zinc sulphide concentrates, and above and below 80%, as to lead concentrates. The premium program will be operative for a period of not to exceed three and one-half ( $3\frac{1}{2}$ ) years from February 1, 1942, but may be terminated earlier should the National Emergency come to an end prior to July 31, 1945, in which event settlement with eligible producers will be made on the basis hereinafter mentioned.

With regard to excess production from the usual "custom ores", various smelting companies throughout the United States have been designated as agents for Metals Reserve Company to obtain and transmit to it the necessary data required for the making of the premium payments. Each producer representing himself as eligible for any premium payment in any month must (1) cause the smelting company to which he ships to be furnished, as agent for Metals Reserve Company, with a sworn producer's affidavit (forms thereof can be obtained by the producer from the smelting company) showing, among other things, the amount of material in excess of quota delivered during the month covered by such affidavit for which he has been paid or will be paid and on which he is eligible for a premium, and (2) cause the smelting company to be furnished with all necessary information so as to enable it to supply Metals Reserve [fol. 58] Company with a statement setting out all data required for the making of the premium payments.

Due to the special method of marketing concentrates which prevails in the Tri-State District, the premium program, as the same relates to Tri-State District zinc sulphide concentrates and lead concentrates, will be handled under a somewhat different arrangement than that described immediately above. Mr. Leslie H. McColgin, Joplin, Missouri, has been designated as representative for Metals Reserve Company in the Tri-State District, and all producers of Tri-State District concentrates representing themselves as eligible for premium payments must cause their sworn affidavits and other required data to be furnished to Mr. McColgin, who will transmit to Metals Reserve Company the necessary papers supporting requests for premium payments.

Following receipt in each month of its agents' and representative's statements, together with the sworn producers' affidavits, Metals Reserve Company will arrange for the payments to be made promptly to the producers.

A principal requirement of the program is that any deficiency in monthly deliveries below the monthly production quota of any producer must be made up in the next succeeding month or months before such producer can receive any premium payment on excess quota production, and the producer's affidavit will be required to show that such deficiency has been made up.

Should the National Emergency come to an end prior to July 31, 1945, Metals Reserve Company will give notice of its intention to terminate the premium program thirty days from the date of the giving of such notice. Thereupon the actual output of each producer, which has been in excess of quota, shall be averaged on a monthly basis for the six calendar months prior to the notice of termination, and such average shall be considered as representing such producer's "monthly capacity to produce in excess of quota" as of the date when notice of termination is served, and such "monthly capacity to produce in excess of quota", multiplied by the number of months remaining before July 31, 1945, shall be considered to be such producer's "total unfulfilled excess production".

[fol. 59] In the event that any producer shall have had excess output for a period of less than six months prior to the notice of termination, then Metals Reserve Company may at its option either (a) base such producer's "monthly capacity to produce in excess of quota" on such producer's rate of excess production during such lesser period, or (b) appoint by agreement with such producer, an arbiter, who shall determine such producer's true "monthly capacity to produce in excess of quota" as of the date when the notice of termination is served.

Metals Reserve Company, having thus established the producer's total unfulfilled excess production", shall thereupon at its option either:

1. Agree to accept a quantity of material equal to such producer's "total unfulfilled excess production", and to settle for such material on the basis of 17 cents for copper, 11 cents for zinc, and 9 1/4 cents for lead, and, as respects Tri-State District concentrates, on the basis of \$84.98 per dry ton for 60% zinc sulphide concentrates, and on the basis of \$118.00 per dry ton for 80% lead concentrates, but leaving the producer free to deliver this material from any part of his production, whether above quota or below quota; or



2. Settle in cash for such "total unfulfilled excess production" (without obligation on the producer to make any further deliveries), at the rate of  $2\frac{1}{2}$  cents for copper,  $1\frac{3}{8}$  cents for zinc, and  $1\frac{3}{8}$  cents for lead, and, as to Tri-State District concentrates, at the rate of \$14.85 per dry ton for 60% zinc sulphide concentrates, and at the rate of \$20.90 per dry ton for 80% lead concentrates.

### Metals Reserve Company

17. Payment of premiums is made by Metals Reserve Company upon the basis of an affidavit of the producer and a statement by Metals Reserve Company's designated agent transmitting such affidavit and in support of the producer's request for premium payments. Such affidavit and statement are required to be made on forms prescribed by Metals Reserve Company and are as follows:

[fol. 60]

#### Affidavit of Producer

Delivering Copper and/or Lead and or Zinc, Taken on or After February 1, 1942, from Mines, Mine Dumps, and Tailing Piles in Excess of Monthly Production Quota(s)

State of \_\_\_\_\_ County of \_\_\_\_\_ ss

The undersigned, being duly sworn, deposes and says:

(1) That \_\_\_\_\_ of which this  
 affiant is \_\_\_\_\_ (Name of producer)  
 \_\_\_\_\_ produced, and delivered to  
 \_\_\_\_\_ (Relationship to purchaser)  
 at its \_\_\_\_\_  
 \_\_\_\_\_ (Company) \_\_\_\_\_ (Copper, lead, zinc, or custom milling)  
 Plant known as \_\_\_\_\_ and situated in the County  
 of \_\_\_\_\_ State of \_\_\_\_\_ during the  
 month of \_\_\_\_\_, 194\_\_\_\_, the quantities of copper,  
 lead, and zinc hereinafter listed:

(2) That (his)(its) monthly production quota(s) as established by the War Production Board and the Office of Price Administration (is) (are) as listed below:

(3) That (his)(its) monthly production quota(s), as hereinafter stated, (has)(have) been filled and the amount(s) of material(s) specified therein (has)(have) been produced, and delivered for sale during the month above mentioned, in addition to the amount(s) of ma-

terial(s) in excess of quota(s) produced and delivered as hereinafter listed:

(4) The deficiencies below said quota(s), if any, for all previous months (has)(have) been produced and delivered before computing the amount(s) of material(s) stated to be in excess of quota(s), and

(5) That all such material(s) (has)(have) been produced and delivered by the above producer and (was)(were) taken from sources within the United States, more particularly from the mine or mines or mine dumps or tailing piles known as \_\_\_\_\_ and located at \_\_\_\_\_

(Name of mine)

(Location of mine)

and (has)(have) not been recovered from secondary or scrap metal.

[fol. 61]

	Pounds of copper	Pounds of lead	Pounds of zinc
To Lead Smelter	x 85%	x 95%	x 90%
To Copper Smelter	x 97%	x 70%	x 77%
To Zinc Smelter	x 70%	x 60%	
To Concentrator	x 87%	x 86%	
Production for premium purposes			
Monthly quota(s)	A		
"	B		
"	C		
Deficiency from previous month(s)	A		
"	B		
"	C		
Excess production eligible for premiums	A		
Excess production eligible for premiums	B		
Excess production eligible for premiums	C		

[fol. 62] The affiant represents to Metals Reserve Company that all information contained herein is correct and true and is stated for the purpose of inducing Metals Reserve Company to make payment of a premium on the material(s) set out herein as being in excess of the producer's monthly production quota(s) assigned to the above-described property.

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_ 194

Notarial Seal.

My commission expires . . .

(Affiant)

(Officer administering oath)

Note: Metals Reserve Company is a corporation duly created by Reconstruction Finance Corporation pursuant to Section 5d of the Reconstruction Finance Corporation Act, as amended. Section 16(a) of the Reconstruction Finance Corporation Act, as amended, provides: "Whoever makes any statement knowing it to be false . . . for the purpose of obtaining money, property, or anything of value, under this Act, shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than two years, or both."

### Receipt from Producer

This is to certify to the Metals Reserve Company that the undersigned has received the following premiums from \_\_\_\_\_ as Agent for Metals Reserve Company:

	Copper	Lead	Zinc
A	\$ _____ lbs. \$ _____	lbs. \$ _____	lbs. \$ _____
B	\$ _____	lbs. \$ _____	lbs. \$ _____
C	\$ _____	\$ _____	lbs. \$ _____
Total	\$ _____	\$ _____	\$ _____

for eligible excess quota metals produced from the above-described mining property and delivered during the month hereinabove stated.

(Name of producer)

(Date)

194

This form should not be used for Tri-State District concentrates.

[fol. 63] Statement of Monthly Production of Producers of Copper and/or Lead and/or Zinc, in Excess of Their Quotas as Fixed by War Production Board and Office of Price Administration, Furnished to Metals Reserve Company in Support of Such Producer's Requests for Premium Payments on Such Excess Production, as Measured by Receipts at the Plant

United States Smelting Refining and Mining Company  
(Agent for Metals Reserve Co.)

(Calendar Month Received at Plant)

Midvale, Utah  
Location of  
Plant

(Type of Plant)

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
Name of Producer	Name of Mine	Location of Mine	Total Copper, Lead or Zinc Contents Re- ceived During Month (Pounds)	Production for Premium Purposes (Pounds)	Monthly Quota (Pounds)	Deficiency, At End of Pre- vious Month (Pounds)	Net Excess at End of Current Month (Pounds)	Premium Per Pound	Amount of Premiums Payable in Respect of Net Excess

Total Col. 10

Certified Correct  
By ..... Date .....  
(Authorized Officer) Auditor.

[fol. 64] The following are copies submitted by the named companies:

**Affidavit of Producer**

**Delivering Copper and/or Lead and/or Zinc Taken on or After February 1, 1942, from Mines, Mine Dumps, and Tailing Piles in Excess of Monthly Production Quota(s)**

State of Utah, County of Salt Lake, ss:

(Copy)

The undersigned, being duly sworn, deposes and says:

(1) That Tintic Standard Mining Company of which this  
(Name of producer)  
affiant is Copper and Lead produced, and delivered to  
(Relationship to producer)  
American Smelting and Refining Company,  
International Smelting and Refining Company at its  
(Company)

Copper and Lead Plant known as Garfield  
(Copper, lead, zinc, or custom milling)  
Plant and Tooele Plant as situated in the County of Tooele,  
State of Utah, during the month of October, 1943, the quantities of copper, lead and zinc hereinafter listed:

(2) That (his)(its) monthly production quota(s) as established by the War Production Board and the Office of Price Administration (is)(are) as listed below:

(3) That (his)(its) monthly production quota(s), as hereinafter stated, (has)(have) been filled and the amount(s) of material(s) specified therein (has)(have) been produced, and delivered for sale during the month above mentioned, in addition to the amount(s) of material(s) in excess of quota(s) produced and delivered as hereinafter listed:

(4) The deficiencies below said quota(s), if any, for all previous months (has)(have) been produced and delivered before computing the amount(s) of materials(s), stated to be in excess of quotas, and

[fol. 65] (5) That all such material(s) (has)(have) been produced and delivered by the above producer and (was)(were) taken from sources within the United States, more particularly from the mine or mines or mine dumps or tailing piles known as Tintic Standard and located at  
(Name of Mine)

Evidend, Utah, and (has)(have) not been recovered from  
(Location of Mine)  
secondary or scrap metal.



[fol. 66]

	Pounds of copper	Pounds of lead	Pounds of zinc
To Lead Smelter.....?	— x 85%	475298 x 95%	—
To Copper Smelter.....	39658 x 97%	157939 x 70%	x 90%
To Zinc Smelter.....	x 70%	x 60%	x 77%
To Concentrator.....	x 87%	x 86%	
Production for premium purposes.....	38460	562090	
Monthly quota(s).....A	0	460000	
".....B	.....	.....	
".....C	.....	.....	
Deficiency from previous month(s).....A	—	—	
".....B	.....	.....	
".....C	.....	.....	
Excess production eligible for premiums.....A	38468	102090	
Excess production eligible for premiums.....B	.....	.....	
Excess production eligible for premiums.....C	.....	.....	

[fol. 67] The affiant represents to Metals Reserve Company that all information contained herein is correct and true and is stated for the purpose of inducing Metals Reserve Company to make payment of a premium on the material(s) set out herein as being in excess of the producer's monthly production quota(s) assigned to the above-described property.

Subscribed and sworn to before me this 7th day of Dec., 1943. (Notarial Seal) My commission expires Oct. 20, 1947.

(Affiant)

Notary Public

(Officer administering oath)

Note: Metals Reserve Company is a corporation duly created by Reconstruction Finance Corporation pursuant to Section 5d of the Reconstruction Finance Corporation Act, as amended. Section 16(a) of the Reconstruction Finance Corporation Act, as amended, provides: "Whoever makes any statement knowing it to be false \* \* \* for the purpose of obtaining money, property, or anything of value, under this Act, shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than two years, or both."

### Receipt From Producer

This is to certify to the Metals Reserve Company that the undersigned has received the following premiums from American Smelting and Refining Co., as Agent for Metals Reserve Company:

	Copper	Lead	Zinc
A	\$ 1,923 40 38.468 lbs.	\$2,807 48 102,090 lbs.	\$..... lbs.
B		\$..... lbs.	\$..... lbs.
C		\$..... lbs.	\$..... lbs.
Total	\$.....	\$.....	\$.....

for eligible excess quota metals produced from the above-described mining property and delivered during the month hereinabove stated. Tintic Standard Mining Company.

By Auditor

Name of producer)

(Date)

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This form should not be used for Tri-State District concentrates.

[fol. 68]

## Affidavit of Producer

Delivering Copper and/or Lead and/or Zinc, Taken on or  
After February 1, 1942, from Mines, Mine Dumps, and  
Tailing Piles in Excess of Monthly Production Quota(s).

STATE OF UTAH,

County of Salt Lake, ss:

## Copy

The Undersigned, being duly sworn, deposes and says:

(1) That United States Smelting Refining and Mining  
(Name of producer)  
Company of which this affiant is Vice President and General  
(Relationship to producer)  
Manager produced, and delivered\* to Itself and American  
Smelting and Refining Company at their Custom Milling—  
(Company)

Lead & Copper Plants known as Midvale Plant Garfield  
Plant, respectively and situated in the County of Salt Lake,  
State of Utah during the month of October, 1943, the quan-  
tities of copper, lead, and zinc hereinafter listed:

(2) That (his) (its) monthly production quota(s) as es-  
tablished by the War Production Board and the Office of  
Price Administration (is) (are) as listed below:

(3) That (his) (its) monthly production quota(s), as  
hereinafter stated, (has) (have) been filled and the  
amount(s) of material(s) specified therein (has) (have)  
been produced, and delivered for sale during the month  
above mentioned, in addition to the amount(s) of material(s)  
in excess of quota(s) produced and delivered as hereinafter  
listed:

(4) The deficiencies below said quota(s), if any, for all  
previous months (has) (have) been produced and delivered  
before computing the amount(s) of material(s) stated to be  
in excess of quota(s) and

[fol. 69] (5) That all such material(s) (has) (have) been  
produced and delivered by the above producer and (was)

---

\* Represented mine production for month stated as shown  
by our books and records.

(were) t  
particul  
ing piles  
and (ha  
scrap m

[fol. 70]

	Pounds of copper	Pounds of lead	Pounds of zinc
To Lead Smelter.....	6,367 x 85%	48,423 x 95%	
To Copper Smelter.....	7,269 x 97%	55,106 x 70%	
To Zinc Smelter.....	x 70%	x 60%	x 90%
To Concentrator.....	51,633 x 87%	1,693,445 x 86%	1,758,924 x 77%
Production for premium purposes.....	57,384	1,540,939	1,351,371
Monthly quota(s).....	44,000	2,410,000	
"			
"			
Deficiency from previous month(s).....	—	4,867,423	2,603,516
"			
"			
Excess production eligible for premiums.....	13,384	5,736,484	2,969,115
Excess production eligible for premiums.....			
Excess production eligible for premiums.....			

[fol. 71] The affiant represents to Metals Reserve Company that all information contained herein is correct and true and is stated for the purpose of inducing Metals Reserve Company to make payment of a premium on the material(s) set out herein as being in excess of the producer's monthly production quota(s) assigned to the above-described property.


F. S. Mulock,  
(Affiant)

Subscribed and sworn to before me this 27th day of April 1944. J. F. Faerber, Notary Public. My  
(Officer administering oath)  
commission expires October 18, 1945. (Notarial Seal.)

Note: Metals Reserve Company is a corporation duly created by Reconstruction Finance Corporation pursuant to Section 5d of the Reconstruction Finance Corporation Act, as amended. Section 16(a) of the Reconstruction Finance Corporation Act, as amended, provides: "Whoever makes any statement knowing it to be false \* \* \* for the purpose of obtaining money, property, or anything of value, under this Act, shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than two years, or both."

### Receipt From Producer

This is to certify to the Metals Reserve Company that the undersigned has received the following premiums from U. S. Smelting Refining and Mining Co., as Agent for Metals Reserve Company:

	Copper	Lead	Zinc
A	\$ 669 20 13,384 lbs.	\$ ..... lbs.	\$ ..... lbs.
B		\$ ..... lbs.	\$ ..... lbs.
C			\$ ..... lbs.
Total	\$ 669 20	\$ ..... 	\$ .....

for eligible excess quota metals produced from the above-described mining property and delivered during the month hereinabove stated.

United States Smelting Refining and Mining Company, E. S. Mulock, Vice President and General Manager.

April 27, 1944.

This form should not be used for Tri-State District concentrates.

[fol. 72]

## Affidavit of Producer

Delivering Copper and/or Lead and/or Zinc, Taken on or After February 1, 1942, from Mines, Mine Dumps, and Tailing Piles in Excess of Monthly Production Quota(s)

STATE OF UTAH,

County of Salt Lake, ss:

copy

The undersigned, being duly sworn, deposes and says:

(1) That National Tunnel & Mines Co. of which this aff-  
 (Name of producer)  
 fiant is Chief Clerk produced, and delivered to Interna-  
 (Relationship to producer)  
 tional Smelting & Refining Co. at its Custom Milling Plant  
 (Company)

known as Tooele Plant and situated in the County of Tooele, State of Utah during the month of October, 1943, the quantities of copper, lead, and zinc hereinafter listed:

(2) That (his) (its) monthly production quota(s) as established by the War Production Board and the Office of Price Administration (is) (are) as listed below:

(3) That (his) (its) monthly production quota(s), as hereinafter stated, (has) (have) been filled and the amount(s) of material(s) specified therein (has) (have) been produced, and delivered for sale during the month above mentioned, in addition to the amount(s) of material(s) in excess of quota(s) produced and delivered as hereinafter listed:

(4) That deficiencies below said quota(s), if any, for all previous months (has) (have) been produced and delivered before computing the amount(s) of material(s) stated to be in excess of quota(s), and

(5) That all such material(s) (has) (have) been produced and delivered by the above producer and (was) (were) taken from sources within the United States, more particularly from the mine or mines or mine dumps or tailing piles known as National Tunnel and located at West Interna-  
 (Name of mine) (Location of mine)  
 tional, Ut. and (has) (have) not been recovered from secondary or scrap metal.



[fol. 73]

	Pounds of copper	Pounds of lead	Pounds of zinc
To Lead Smelter.....	x 85%	x 95%	
To Copper Smelter.....	x 97%	x 70%	
To Zinc Smelter.....	x 70%	x 60%	x 90%
To Concentrator.....	x 87%	x 86%	x 77%
Production for premium purposes.....	586,557	189,375	103,864
Monthly quota(s).....	510,305	162,863	79,975
"                    ".....	0	0	0
"                    ".....	0-Spec. 0 10¢	0	0
Deficiency from previous month(s).....	0	0	0
"                    ".....	0	0	0
"                    ".....			0
Excess production eligible for premiums.....	510,305	162,863	79,975
Excess production eligible for premiums.....	510,305	162,863	79,975
Excess production eligible for premiums.....			

[fol. 74] The affiant represents to Metals Reserve Company that all information contained herein is correct and true and is stated for the purpose of inducing Metals Reserve Company to make payment of a premium on the material(s) set out herein as being in excess of the producer's monthly production quota(s) assigned to the above-described property.

J. W. Torreyson (Affiant).

November, 1943. F. G. Cannard. My commission  
(Officer administering oath)  
expires Aug. 1943. (Notarial Seal.)

Note: Metals Reserve Company is a corporation duly created by Reconstruction Finance Corporation pursuant to Section 5d of the Reconstruction Finance Corporation Act, as amended. Section 16(a) of the Reconstruction Finance Corporation Act, as amended, provides: "Whoever makes any statement knowing it to be false \* \* \* for the purpose of obtaining money, property, or anything of value, under this Act, shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than two years, or both."

### Receipt From Producer

This is to certify to the Metals Reserve Company that the undersigned has received the following premiums from International Smltg. & Ref. Co., as Agent for Metals Reserve Company:

	Copper	Lead	Zinc
A	\$24,515.25 510,305 lbs.	\$4,478.73 162,863 lbs.	\$2,199.31 79,975 lbs.
B	\$51,030.50 510,305 lbs.	\$4,478.73 162,863 lbs.	\$2,199.31 79,975 lbs.
C			\$2,199.31 79,975 lbs.
Total	\$76,545.75	\$8,957.46	\$6,597.93

for eligible excess quota metals produced from the above-described mining property and delivered during the month hereinabove stated.

National Tunnel & Mines Co., per J. W. Torreyson.

Nov. 18, 1943.

This form should not be used for Tri-State District concentrates.

[fol. 75] 18. Metals Reserve Company does not purchase the ores on account of the production of which it pays premiums to the producer; they are not taken into account in tariffs filed by railways and approved by the Interstate Commerce Commission or Public Service Commission fixing freight rates on ores or concentrates, and predicated primarily on metal value content; smelting companies may not participate in such premium payments even though their normal charges be based upon a sliding scale dependent upon the value of the metal contents of ores.

19. In certain instances premium payments are made in advance of a sale of ores or the metals recovered from ores; in other instances such payments are made after sale of the ores. Typical instances are as follows:

(a) Kennecott Copper Corporation ships the precipitates and concentrates resulting from the operation of its reduction works and milling plants to the custom smelter owned and operated by American Smelting and Refining Company at Garfield, Utah; said Smelting Company receives such precipitates and concentrates as a bailee; it smelts such precipitates and concentrates, thereby converting them into blister copper, carrying copper and other metals; it then ships such blister copper to its refineries located outside the State of Utah, where it refines the same, separating the various metals contained therein. Thereafter it returns to Kennecott Copper Corporation in such separated form the equivalent of the copper, gold, silver and other metals contained in the precipitates and concentrates originally delivered to it. Subsequently such metals are marketed by Kennecott Copper Corporation.

Premium payments are made by Metals Reserve Company to Kennecott Copper Corporation on the basis of the determined metal content of the precipitates and concentrates delivered to American Smelting and Refining Company. Affidavits covering each month's over-quota production as so determined are forwarded through American Smelting and Refining Company to Metals Reserve Company and premium payments are received in from 17 to 27 days thereafter. The metals recovered from such precipitates and concentrates ordinarily become available for marketing approximately three months after their delivery to the smelter.

(b) United States Smelting Refining and Mining Company processes most of the ore produced at its own properties at its mill and smelter at Midvale, Utah, and the resulting products are shipped out of the state for further processing to refined metal. The processing is done by a subsidiary company or independent companies, principally on a toll basis, which provides for the return of an agreed percent of equivalent metals which are marketed by it.

Premium payments are received by United States Smelting Refining and Mining Company on the basis of monthly affidavits showing the production according to the Company's records from each mine owned by the Company and from 30 to 90 days before the recoverable metals are available for sale.

(c) An independent or custom shipper selling its ore to a smelting company or custom mill receives premium payments after the sale of such ores. At the end of each month an affidavit is prepared covering shipments received by the smelter during such month, which affidavit is transmitted to Metals Reserve Company and on the basis thereof premiums are paid.

Where a producer ships part of its ores to one smelter and part to another, it is required to designate through which smelter its premium payments are to be made and all premium payments covering ores of such producer are made through the smelter so designated; notwithstanding that part of the ores, on account of the production of which premiums are paid, were shipped or sold to another smelter.

The following companies are independent or custom shippers: Tintic Standard Mining Company; Eureka Lily Consolidated Mining Company; Park-Utah Consolidated Mining Company; Silver King Coalition Mines Company; New York Mining Company; Eureka Bullion Mining Company; Ohio Copper Company; Colorado Consolidated Mining Company; Eagle & Blue Bell Mining Company; Montana-Bingham Mining Company; Niagara Mining Company; Chief Consolidated Mining Company.

Silver King Coalition Mines Company sells its concentrates [fol. 77] F. O. B. its mill at Park City. Currently Chief Consolidated Mining Company is selling all its ores to Combined Metals Reduction Company, but receives all premium payments through American Smelting, Refining and Mining Company.

20. The Mining Companies caused to be prepared and submitted to Metals Reserve Company a memorandum respecting the inclusion of premium payments in "net proceeds" and in "mine occupation tax". After examining such memorandum a letter was written by the President of Metals Reserve Company to Mr. F. S. Mulock. Such memorandum and letter were, upon proper identification, received in evidence by the Commission (but the Commission shall not be bound by the facts, inferences or conclusions therein stated) and read as follows:

(letterhead)

METALS RESERVE COMPANY, WASHINGTON

Charles B. Henderson, President

Mr. F. S. Mulock, Vice President and General Manager,  
United States Smelting Refining and Mining Company,  
Newhouse Building, Salt Lake City, Utah.

DEAR MR. MULOCK:

At your request, we have examined the attached "Memorandum Re Inclusion of Premium Payments in 'Net Proceeds' for Assessment of Metalliferous Mines and In Mine Occupation Tax", which we understand was prepared by Utah mine operators for presentation to the Utah State Tax Commission.

Metals Reserve Company has made no study of the provisions of the Utah laws relating to taxation of mines, and is not in a position to express any opinion concerning statements in the Memorandum on that subject. However, the statements in the Memorandum with respect to premium payments by Metals Reserve Company, beginning with the final paragraph on page 2 and continuing to the end of the Memorandum, are, in our opinion, factually true and correct.

For your information, we are enclosing statements issued by this Company under date of March 7, 1942 (Revised) and March 5, 1943, together with copy of Press Release RFC [fol. 78] 1802, which collectively contain full details of this premium payment program.

With best wishes, I am

Sincerely yours, Charles B. Henderson, President.

Enclosures.

**Memorandum Re Inclusion of Premium Payments in "Net Proceeds" for Assessment of Metalliferous Mines and in Mine Occupation Tax.**

The State Tax Commission, in assessing metalliferous mines, has included in "net proceeds" amounts received from Metals Reserve Company as premium payments on account of production and in fixing Occupation Tax has likewise included such premium payments. Such actions by the State Tax Commission are unwarranted as a matter of law:

For purposes of assessment the "net annual proceeds" of a metalliferous mine are defined as "the gross proceeds realized during the preceding calendar year from the *sale or conversion into money or its equivalent* of all ore from such mine or mining claim extracted \* \* \* during or previous to the year for which the assessment is made,"—less the deductions enumerated in Section 80-5-57, Utah Code Annotated, 1943.

The Mining Occupation Tax is "an occupation tax equal to 1% of the gross amount received for, or the gross value of metalliferous ore sold \* \* \*".

The basis for computing the tax is as follows:

(a) "If the ore or metals extracted is sold under a bona fide contract of sale the amount of money or its equivalent actually received by the owner, lessee, contractor or other person operating the mine or mining claim, from the sale of all ores or metals during the calendar year, \* \* \*"—less the reasonable cost of transportation.

(b) If the extracted ore is treated at a mill, smelter or reduction works which receives ores from independent [fol. 79] sources and which is owned or controlled by the same interest owning or controlling the mine or mining claim, such disposal shall be treated as a sale, within the meaning of this section for the purpose of determining gross proceeds, or otherwise, and in such determination a rate or charge for sampling, assaying, milling and smelting the ores and extracting the metals and minerals therefrom, shall be deducted, which shall not exceed an amount to be determined by applying the same rates as are applied by such mill, smelter or reduction works, or competing works to ores of substantially like character and in like quantities received from



independent sources". (Transportation charges also to be deducted.)

(c) "If a mill or other reduction works is operated exclusively in connection with a mine, such mill or reduction works shall be treated as a part of the mine and the cost of operating such mill or reduction works shall for the purpose of fixing the occupation tax . . . be regarded as part of the cost of mining and cost of assaying, sampling, smelting, refining and transportation only shall be deducted". (See Section 80-5-66, Utah Code Annotated, 1943.)

Note that "net proceeds" are limited to an amount received "from the sale or conversion into money or its equivalent of all ores" and that the Occupation Tax is computed by taking "the amount of money or its equivalent actually received . . . from the sale of all ores or metals",—less a specified deduction for transportation and less a specific exemption of \$20,000. Also that the provisions respecting treatment of ores at a mill or other reduction works operated exclusively in connection with a mine and treatment at a mill, smelter or reduction works owned in common with the mine and which also receives ores from independent sources, are for the purpose of insuring that the basis where an actual sale is made shall not be reduced by excessive or unreasonable charges.

Both with respect to "net proceeds" and with respect to the Occupation Tax the statutes put it beyond doubt that only the amounts received from the sale or conversion into money or its equivalent of ores produced by a mine are to be taken into account. All other receipts and revenues are excluded. It would not be contended for instance that amounts [fol. 80] received by a mining company for hauling men, supplies, ore or waste for another company, or amounts received as compensation for use of its workings granted by one company to another, would be included in fixing net proceeds or computing Occupation Tax.

There is no more reason for including premium payments made by Metals Reserve Company to encourage increased production of ore than for including such payments as above mentioned.

Premium payments made by Metals Reserve Company are not payments made by the Company or received by the

Mining Company for the sale or conversion into money or its equivalent of any ores:

Such premium payments are not realized from a sale; they are not paid by a purchaser (Metals Reserve Company does not purchase the ores upon account of which it makes premium payments); they are not paid at the time of a sale, nor are they based upon recoverable metals or actual recoveries at any particular concentrator or smelter, nor upon the terms of private settlement contracts; they are specifically exempted from the Excess Profits Tax; they are not taken into account in tariffs filed by railways and approved by the Interstate Commerce Commission or Public Service Commission fixing freight rates on ores or concentrates and predicated primarily on metal value content; smelters may not participate in such payments even though their normal charges be based upon a sliding scale dependent upon value of metal contents.

The announced purpose of premium payments was "to expand output of copper, lead and zinc because of their importance in the production of armaments", "\* \* \* to compensate operators for extra costs involved for bringing out additional metal output", "\* \* \* to make it possible quickly to increase production by mining low grade sub-marginal ores and to develop additional ore reserves". (See OPA Release, February 9, 1942.)

Such purpose is emphasized by the order freezing royalties and prohibiting diversion of any part of "B" and "C" quotas,—it being said that diversion of such added premiums into increased royalties to landowners would be "an unwarranted expenditure of public funds which can contribute nothing to further production".

To the extent that any portion of such premiums are taken by a state on account of a property tax, the purpose of Metals Reserve Company in paying the same would be defeated and such funds be diverted from use in the production of ores to a contribution to the support of state or local government.

21. The net proceeds valuations involved in the assessments of the protesting companies whose signatures are attached to this stipulation, are correctly set forth in a statement attached to and made part of this stipulation, the same being headed "Net Proceeds Valuations Reported by Protesting Companies, and Valuations Assessed by Tax

Commission, Tax Assessment for 1944, Operations for 1943." This statement shows under designated headings the Gross Proceeds reported by mining companies in which are not included the metal premium payments, the amounts of metal premium payments, the gross proceeds used by the Tax Commission in computing the net proceeds valuation, the deductions allowed by the Tax Commission, the net proceeds according to returns of the mining companies, the net proceeds as computed by the Tax Commission, the net proceeds valuation according to returns of the mining companies, and the net proceeds valuation as assessed by the Tax Commission for the year 1944. The difference between the net proceeds valuation assessed and the net proceeds valuation reported represents for each company the amount of the net proceeds valuation in controversy.



(Here follows 1 paster, side folio 83-84)

[fols. 83-84]

**Net Proceeds Valuations Reported by Protesting Companies and Valuation Assessed by Tax Commission  
Tax Assessment for 1944, Operations for 1943**

	Gross Proceeds (Smelter Returns*)	Metal Premium Payments	Gross Proceeds Assessed	Deductions Allowed	Net Proceeds		Net Proceeds Valuation	
					Reported	Assessed	Reported	Assessed
Chief Consolidated Mining Co.	\$ 125,227.92	\$ 492,238.84	\$ 617,466.76	\$ 534,912.23	None	\$ 82,554.53	None	\$ 165,109
Colorado Consolidated Mines Co.	21,538.25	13,758.12	35,296.37	42,700.91	None	None	None	None
Combined Metals Reduction Co.—Butterfield Mine	188,971.12	238,209.81	427,180.93	488,742.36	None	None	None	None
Combined Metals Reduction Co.—Calumet Mine	390,679.96	272,150.86	662,830.82	501,888.44	None	160,942.38	None	321,885
Eagle & Blue Bell Mining Co.	51,293.06	1,439.39	52,732.45	75,206.79	None	None	None	None
Eureka Bullion Mining Co.	92,404.74	7,144.87	99,549.61	65,080.56	27,324.18	34,469.05	54,648	68,938
Eureka Lily Cons. Mining Co.	44,565.19	10,792.25	55,357.44	38,462.80	6,102.39	16,894.64	12,205	33,789
International Smelting Co.—Tintic Bullion Mine	316,834.99	25,892.69	342,727.68	271,841.10	44,993.89	70,886.58	89,588	141,773
Kennecott Copper Corporation	96,626,500.87	3,781,421.55	100,407,922.42	48,858,174.40	47,768,326.47	51,549,748.02	95,536,653	103,099,496
Montana Bingham Cons. Mining Co.	84,171.43	32,958.59	117,130.02	55,236.05	28,935.38	61,893.97	57,871	123,788
National Tunnel & Mines Co.	397,855.61	886,975.64	1,284,831.25	1,464,156.69	None	None	None	None
New Park Mining Co., Keetley	1,233,127.17	376,348.07	1,609,475.24	951,112.77	282,014.40	658,362.47	564,029	1,316,725
Niagara Mining Co.	30,358.95	1,227.85	31,586.80	69,750.86	None	None	None	None
Ohio Copper Company of Utah	262,682.94	142,889.45	405,572.39	268,624.41	None	136,947.98	None	273,896
Park Utah Construction Mines Co.	782,564.05	905,506.66	1,688,070.71	1,229,676.35	None	458,394.36	None	916,789
Silver King Coalition Mines Co.	1,455,245.89	453,353.54	1,908,599.43	1,596,191.21	None	312,408.22	None	624,816
Tintic Standard Mining Co.	660,760.99	440,494.16	1,101,255.15	802,154.33	None	299,100.82	None	598,202
Tintic Standard Mining Co.—Iron Blossom Mine	2,486.29	5,985.64	8,471.93	4,912.13	None	3,559.80	None	7,120
U. S. Smelting Co.—Hidden Treasure Mine	144,693.74	24,489.40	169,183.14	150,220.26	None	18,962.88	None	37,926
U. S. Smelting Co.—U. S. & Lark Mine	3,595,831.45	99,078.56	3,694,910.01	2,966,884.25	728,947.20	728,025.76	1,257,894	1,456,052

\* Smelter Returns, except in case of Kennecott Copper Company, which reports its sales of metal in the open market.

[fols. 85-86] The amount of occupation tax involved in the assessments of the protesting companies whose signatures are attached to this stipulation are correctly set forth in a statement attached to and made a part of this stipulation, the same being headed "Statement of Occupation Tax Reported by Protesting Companies, and Amounts Assessed by Tax Commission, Assessment for 1944, Operations for 1943." This statement shows under designated headings the amounts reported by the mining companies as the basis for computation of the occupation tax—not including the metal premium payments, the amounts of metal premium payments, the amounts used by the Tax Commission in computing the occupation tax, the amount of the occupation tax according to the returns of the mining companies, and the amounts of the occupation tax assessed by the Tax Commission. The difference between the occupation tax assessed, and the occupation tax reported represents for each company the amount of occupation tax in controversy.



[cols. 87-88]

Statement of Occupation Tax Reported by Protecting Companies and Amounts Assessed by Tax Commission  
Assessment for 1944, Operations for 1943

	Reported Basis for Computation of Tax	Metal Premium Payments	Assessment Basis for Computation of Tax	Occupation Tax Reported	Occupation Tax Assessed
Chief Consolidated Mining Co.	105,227.92	492,238.84	597,466.76	1,052.28	5,974.67
Colorado Consolidated Mines Co.	1,538.25	13,758.12	15,296.37	15.38	152.96
Combined Metals Reduction Co.—Butterfield Mine	168,971.12	238,269.81	407,180.93	1,689.71	4,071.81
Combined Metals Reduction Co.—Calumet Mine	370,679.96	272,150.86	642,830.82	3,706.80	6,128.31
Eagle & Blue Bell Mining Co.	31,293.06	1,439.39	32,732.45	312.93	327.32
Eureka Bullion Mining Co.	71,332.77	7,144.87	78,477.64	713.33	784.78
Eureka Lily Cons. Mining Co.	24,565.19	10,792.25	35,357.44	245.65	353.57
International Smelting Co.—Tintic Bullion Mine	294,910.16	25,892.69	320,802.85	2,949.10	3,208.03
Kennecott Copper Corporation	77,762,913.44	3,781,421.55	81,544,334.99	777,629.13	815,443.35
Montana Bingham Cons. Mining Co.	64,171.43	32,958.59	97,130.02	641.71	971.30
National Tunnel & Mines Co.	322,949.32	886,975.64	1,209,924.96	3,229.49	12,099.25
New Park Mining Co.—Keechley	1,213,127.17	376,348.07	1,589,475.24	12,131.27	15,894.75
Niagara Mining Co.	30,358.95	1,227.85	31,586.80	303.59	315.87
Ohio Copper Co. of Utah	234,027.18	142,889.45	376,916.63	2,300.46	3,729.36
Park Utah Cons. Mines Co.	740,805.95	905,596.66	1,646,412.61	7,408.06	16,463.13
Silver King Coalition Mines Co.	1,396,983.32	453,353.54	1,850,336.86	13,969.83	18,503.37
Tintic Standard Mining Co.	640,760.99	440,494.16	1,081,255.15	6,407.61	10,812.55
U. S. Smelting—Hudon-Treasure Mine	124,693.74	24,489.40	149,183.14	1,246.94	1,491.83
U. S. Smelting Co.—U. S. & Lark Mine	3,575,831.45	99,078.56	3,674,910.01	35,758.31	36,749.10

[fol. 89] 21. (a)

At the hearing on the above matter before the Commission it was stipulated that the attached letter was written by the Commission to the Attorney General of Utah and that his reply thereto, also hereto attached, was received by the Commission as of the dates which they respectively bear. It was further stipulated that such letter and the reply thereto should become a part of the foregoing stipulation but it was agreed that no party hereto is bound by the facts, inferences or conclusions therein contained.

April 25, 1944.

The Honorable Grover A. Giles, Attorney General of Utah,  
Building.

DEAR MR. GILES:

As you are aware, Sections 80-5-57 and 80-5-46, Utah Code Annotated, 1943, impose a "net annual proceeds" tax and an "occupation" tax upon proceeds received from certain mining operations. The amount of tax is based upon gross proceeds after certain specified deductions are taken.

About a year ago a question arose as to whether or not premium payments received by the mining companies subject to this tax should be included in arriving at the gross proceeds. These premium payments were made to the mining companies by the Metals Reserve Corporation on the basis of established quotas and were made for the purpose of increasing production.

In connection with the problem as it arose a year ago, certain facts were presented to the Commission. It appeared that a local committee was established to determine the quotas, and premium payments were to be made for production in excess of such quotas. The purpose of such payments was to obtain increased productions in aid of the war effort. The production in excess of the quotas could be realized only at an increased cost of production. However, there was no direct relationship between an increase in cost which might arise and the amount paid by way of [fol 90] premium payments. The payments were set at so much per pound for production in excess of the established quotas. The payments per pound varied with the different types of metals and were made before the ore was actually

sold or converted by the mining companies. Payments made by Metals Reserve Corporation were made for and on behalf of the United States Government.

As a result of all the facts which were presented to the Commission it was concluded that the amounts received by mining companies within the State of Utah by way of premium payments did not constitute part of the gross proceeds for the purpose of arriving at the amount of "net proceeds" and "occupation" taxes due the State of Utah.

It now appears that certain mining companies will realize no net proceeds if such companies are permitted to deduct the full amount of the items set out in 80-5-57 and 80-5-66 as deductions. The Commission would like to have your opinion as to whether or not it would be proper to insist upon the deductions being prorated in proportion to the amount received as a premium payment. In other words, if a company receives half its income as a premium payment, may the Commission permit said company to deduct only 50% of the amounts paid out which are deductible items under 80-5-57 and 80-5-66, Utah Code Annotated, 1943?

Your reply in this matter will be greatly appreciated.

Respectfully yours, State Tax Commission, J. Lambert Gibson, Chairman.

418:JH.

May 12, 1944.

J. Lambert Gibson, Chairman, State Tax Commission, Building.

DEAR MR. GIBSON:

In your letter of April 25, 1944, you request an opinion from this department with respect to the monies received by mining companies from the Metals Reserve Company as [fol. 91] "premium payments"—whether such monies are to be included as "gross proceeds" within the meaning of Section 80-5-57, Utah Code Annotated, 1943; and whether such monies should be included in determining the "occupation tax" within the meaning of Section 80-5-66, Utah Code Annotated, 1943.

While there is a difference in the wording of Sections 80-5-57 and 80-5-66, the conclusion to be reached with respect to the former section will, as hereinafter disclosed,

be determinative of the conclusion to be reached with respect to the latter.

Considering first the problem of whether "premium payments" should be included in "gross proceeds", the problem seems to be one of interpretation of the underscored part of Section 80-5-57, as follows:

"The words, 'net annual proceeds,' of a metalliferous mine or mining claim are defined to be the *gross proceeds realized during the preceding calendar year from the sale or conversion into money or its equivalent of all ores* from such mine or mining claim extracted by the owner or lessee, contractor or other person working upon or operating the property . . . ."

In order to determine whether "premium payments" fall within the term "gross proceeds", we must consider the nature and purpose of such "premium payments". The following facts appear from the testimony taken before the State Tax Commission in June, 1943:

1. At the outset, the Office of Price Administration on August 12, 1941, issued its price schedule No. 15 to the effect that "no person shall sell, offer to sell, deliver or transfer copper; and no person shall buy, offer to buy, or accept delivery of copper at prices higher than the maximum price set forth in Appendix A hereof". The same type of restriction was imposed as to the sale or purchase of lead and zinc so that the producers of metals were specifically limited to the ceiling price in the sale of ores to private industry.

2. In order to encourage greater production of ores, the Federal Government, through the Metals Reserve Company, offered a premium (to be in addition to the maximum price which the producer might receive) for the production of ores above a given quota.

3. The quota was determined on the basis of the 1941 ore production of the property involved and ranged from less than 1941 production to more than 1941 production. One purpose of the "premium payment" plan was to "expand the output of copper, lead and zinc because of their importance in the production of armaments". In general, quotas were fixed "to include ore output that can reasonably be expected at established market prices for the

metals of 12¢ per pound for copper, 8.25¢ for zinc and 6.50¢ for lead."

4. The "premium payments" are calculated on the basis of the amount of metal content of the ores produced and delivered to the smelter. The affidavit of the producer requires him to state the quantities of copper, lead and zinc "produced and delivered to

(Company)

5. The total cost of producing the ores, on which "premium payments" are received, is included by the producer in determining his "net proceeds" under Section 80-5-57, although, a further purpose of the plan of extending "premium payments" to producers was "to compensate operators for extra costs involved in bringing out additional metal output".

6. The premium payments are received from the Federal Government through the Metals Reserve Company although the ore is sold to private enterprise.

In determining the status of "premium payments", the following conclusions are inescapable:

The amounts paid by Metals Reserve Company represent an additional value of the metal produced above the quota. There is no doubt that the metal produced could be sold on the market for a higher price than the ceiling set by the Office of Price Administration. In fact, the figures 17¢ for copper, 9½¢ for lead and 11¢ per pound for zinc are used in the "Program for Premium Payments by Metals Reserve Company on Production of Copper, Lead and Zinc in [fol. 93] Excess of Monthly Production Quotas". As stated in that bulletin, the company will pay a premium "which will reflect the difference between the respective ceiling prices for the materials involved" and the figures therein set forth. Inasmuch as the Federal Government eventually purchases, in connection with the war program, practically all of the metal produced, it matters little whether it makes a premium payment at the time the ores are mined or whether it pays additional for the finished products containing the metal. Although the quotas set and the basis for evaluation of the ore as to the metal content are somewhat arbitrary, there is no doubt that it was intended by the plan to pay an additional amount for the actual metal sent to the market by the producer. In most instances, the

ore is actually sold by the producer to the smelting or refining company so that the "premium payment" is made in connection with the sale of the ore. One exception to this is the Utah Copper Company, which smelts its own ore and in connection with the Kennecott Company (the parent corporation) has its own sales outlet for the finished product.

With respect to the Utah Copper Company, the term "from the sale or conversion into money or its equivalent", as used in Section 80-5-57, has been interpreted in the case of Salt Lake County vs. Utah Copper Company, 93 Fed. (2d) 127. The Circuit Court of Appeals there adopted the opinion of the Trial Court as follows:

"The trial court concluded that the phrase 'gross proceeds realized during the preceding calendar year from the sale or conversion into money or its equivalent, of all ores from such mine,' embraced the amount received from sales in such year of blister copper, gold and silver bullion produced in such year, and the amount of the blister copper, gold and silver bullion produced in such year but remaining unsold at the end of the year, the latter amount to be arrived at by appraisal: \* \* \*." (Italics added)

The Court went on to say that the interpretation given to the phrase "sale or conversion into money or its equivalent" [fol. 94] lent "by the taxing authorities over a period of years, which included the appraised value of blister copper not sold as part of the 'gross proceeds' was upheld by the legislative enactment of 1937 (Laws of Utah, 1937, Chapter 101, Page 193), now Section 80-5-55, Utah Code Annotated, 1943; that section provides for the 'Occupation Tax and Assessment Book of Mines in which such book must be specified' (6) amount received for ore and metal if sold; if not sold the value thereof.

In a situation where the ore is not sold but premium payments have been received, the premium payments would be considered a *prepayment* and the appraised value at the ceiling price of the metal would represent the balance of the value of the ore. There would thus be a partial conversion into money by the premium payment.

From the foregoing, it must be determined that the "premium payments" received from the Metals Reserve Company should be included as a part of the gross proceeds under Section 80-5-57. The fact that the money comes from



a federal agency rather than from private industry does not alter the situation in any respect nor does the fact that the "premium payments" are made only on ores produced in excess of the quota have any bearing upon the problem. The "premium payments" are made for the production of the metal which is placed on the market and eventually finds its way into products for the most part purchased by the Federal Government in furtherance of the war effort.

The same conclusion must be reached also as to the occupation tax under Section 80-5-66. The statute there specifically provides that such tax shall be based upon the "gross amount received for or the gross value of metaliferous ore sold". Certainly, it cannot be contended otherwise than that the value of the ore produced over and above the particular quota is represented by the figure of 17¢ for copper, 9½¢ for lead and 11¢ for zinc (this being the total amount received for such ore and is represented by adding the "premium payment" to the ceiling price established).

In conclusion, we wish to quote the definition of "net annual proceeds of a mine" as defined by our Supreme Court in the case of *Mercur Gold Mining and Milling Company vs. Spry*, 16 Utah 222, 52 P. 382:

"By the term 'net annual proceeds of the mine' is *meant* what is annually realized from the product of the mine, over and above all the costs and expenses of obtaining such proceeds and converting the same into money. This construction was afterwards prescribed by section 64, p. 442, of the revenue laws of 1896. The effect of this provision of the constitution was, not to presently tax the annual product of the mines, but to declare that such product should be *taxes* as provided by law."

See also *Tiptic Standard Mining Company vs. Utah County*, 80 Utah 491, 15 P. (2d) 633.

Very truly yours, Grover A. Giles, Attorney General,  
by Arthur H. Neilson, Assistant.

AHN:mh.

Approved

22. All taxpayers' statements and returns made by the mining companies involved herein, and all protests, objections and petitions for correction of the valuations and assessments made by the Commission as herein referred to are hereby expressly incorporated in and made a part of this

stipulation, and all assessment records of the Commission and notices of assessment and valuation by the Commission to the taxpayers concerned are incorporated in and hereby made a part of this record.

The matters set forth in paragraphs 1 to 22, inclusive, of the foregoing stipulation contain all the relevant and material facts to the controversy involved herein; and upon said facts the applicable statute shall be interpreted and applied.

Dated this 26th day of June, 1944, at Salt Lake City, Utah.

The State Tax Commission of the State of Utah, by W. L. Skanchy, Its Attorneys; Tintic Standard Mining Company, by Ingebretsen, Ray, Rawlins & Christensen, Its Attorneys; Eureka Lily Consolidated Mining Company, by Ingebretsen, Ray, Rawlins & Christensen, Its Attorneys; Park-Utah Consolidated Mining Company, by Ingebretsen, Ray, Rawlins & Christensen, Its Attorneys; Silver King Coalition Mines Company, by R. J. Hogan, Its Attorneys; New Park Mining Company, by Harry Metos, Its Attorneys; Eureka Bullion Mining Company, by Farnsworth & Van Cott, Its Attorneys; International Smelting and Refining Company, by Farnsworth & Van Cott, Its Attorneys; Ohio Copper Company, by Farnsworth & Van Cott, Its Attorneys; Kennecott Copper Corporation, by C. C. Parsons, Its Attorneys; Colorado Consolidated Mining Company, by Ingebretsen, Ray, Rawlins & Christensen, Its Attorneys; National Tunnel and Mines Company, by Farnsworth & Van Cott, Its Attorneys; Combined Metal Reduction Company, by H. Van Dam, Its Attorneys; United States Smelting, Refining and Mining Company, by Cheney, Jensen, Marr & Wilkins, Its Attorneys; Eagle & Blue Bell Mining Company, by Cheney, Jensen, Marr & Wilkins, Its Attorneys; Montana-Bingham Consolidated Mining Company, by Cheney, Jensen, Marr & Wilkins, Its Attorneys; Chief Consolidated Mining Company, by Cheney, Jensen, Marr & Wilkins, Its Attorneys; Niagara Mining Company, by Cheney, Jensen, Marr & Wilkins, Its Attorneys. Grover Giles, Attorney General.

## EXHIBIT No. 2

(No. 8734)

Establishing the Office of Price Administration and Civilian Supply in the Executive Office of the President and Defining Its Functions and Duties.

By virtue of the authority vested in me by the Constitution and the statutes, and in order to define further the functions and duties of the Office for Emergency Management with respect to the national emergency as declared by the President on September 8, 1939, for the purpose of avoiding profiteering and unwarranted price rises, and of facilitating an adequate supply and the equitable distribution of materials and commodities for civilian use, and finding that the stabilization of prices is in the interest of national defense and that this Order is necessary to increase the efficiency of the defense program, it is hereby ordered:

1. There shall be in the Office for Emergency Management of the Executive Office of the President and Office of Price Administration and Civilian Supply, at the head of which shall be an Administrator appointed by the President. The administrator shall receive compensation at such rate as the President shall determine and, in addition, shall be entitled to actual and necessary transportation, subsistence, and other expenses incidental to the performance of his duties.

2. Subject to such policies, regulations, and directions as the President may from time to time prescribe, and with [fol. 98] such advice and assistance as may be necessary from the other departments and agencies of the Federal Government, and utilizing the services and facilities of such other departments and agencies to the fullest extent compatible with efficiency, the Administrator shall:

a. Take all lawful steps necessary or appropriate in order (1) to prevent price spiraling, rising costs of living, profiteering, and inflation resulting from market conditions caused by the diversion of large segments of the Nation's resources to the defense program, by interruptions to normal sources of supply, or by other influences growing out of the emergency; (2) to prevent speculative accumulation, withholding, and hoarding of materials and commodities;

(3) to stimulate provision of the necessary supply of materials and commodities required for civilian use, in such manner as not to conflict with the requirements of the War, Navy, and other departments and agencies of the Government, and of foreign governments, for materials, articles, and equipment needed for defense (such requirements are hereinafter referred to as "military defense needs"); and (4) after the satisfaction of military defense needs, to provide, through the determination of policies and the formulation of plans and programs, for the equitable distribution of the residual supply of such materials and commodities among competing civilian demands.

b. Make studies of the Nation's civilian requirements for materials and commodities, the supply of goods and services, the status and trend of prices and factors thereof, and the impact of the defense program upon civilian living standards; exercise the powers of the President in requesting such studies pursuant to Section 336(a) of Title III of the Tariff Act of 1930 (Title 19, U. S. C., Sec. 1336(a)); and conduct such investigations, hold such hearings, and obtain such reports as may be necessary or desirable to carry out this order.

c. Determine and publish, after proper investigation, such maximum prices, commissions, margins, fees, charges, or other elements of cost or price of materials or commodities, as the Administrator may from time to time deem [fol. 99] fair and reasonable; and take all lawful and appropriate steps to facilitate their observance.

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Franklin D. Roosevelt.

The White House, April 11, 1941.

(No. 8875)

### Delegation and Coordination of Priority Authority

By virtue of the authority vested in me by the Constitution and statutes of the United States, and in order to define further the functions and duties of the Office for Emergency Management with respect to the unlimited national emergency as declared by the President on May 27, 1941, and

for the purpose of assuring effective coordination of the priority powers and supply allocation activities of the Federal Government in furtherance of and in conformity with the basic defense policies of the President, it is hereby ordered as follows:

3. In order to assure unity of policy and coordinated consideration of all relevant factors involved in the supply and allocation of materials and commodities among the various phases of the defense program and competing civilian demands, there is hereby established within the Office for Emergency Management a Supply Priorities and Allocations Board. The Board shall consist of the Director General and Associate Director General of the Office of Production Management, the Secretary of War, the Secretary of the Navy, the Special Assistant to the President supervising the defense aid program, the Administrator of the Office of Price Administration, and the Chairman of the Economic Defense Board. The Chairman of the Supply Priorities and Allocations Board shall be designated by the President from among the members of the Board. The President shall also appoint an Executive Director of the Board, who will preside in the absence of the Chairman.

[fol. 100] 5. Consistent with the basic defense policies of the President, the Supply Priorities and Allocation Board shall:

a. Determine the total requirements of materials and commodities needed respectively for defense, civilian, and all other purposes; establish policies for the fulfillment of such requirements, and, where necessary, make recommendations to the President relative thereto.

b. Determine policies and make regulations governing allocations and priorities with respect to the procurement, production, transmission, or transportation of materials, articles, power, fuel, and other commodities among military, economic defense, defense aid, civilian, and other major demands of the total defense program.

6. The Office of Production Management through its Division of Priorities or any other of its divisions or sub-

divisions shall formulate general plans and programs providing for allocations and priorities with respect to the procurement, production, transmission, or transportation of materials, articles, power, fuel, and other commodities among military requirements, economic defense needs, total civilian demands, defense aid needs, and other major elements of the total defense program. Such general plans and programs shall be submitted to the Supply Priorities and Allocations Board for approval or modification.

. . . . .  
8. The title of the Office of Price Administration and Civilian Supply, established by Executive Order No. 8734 of April 11, 1941, is hereby changed to Office of Price Administration.

. . . . .  
11. Executive Orders No. 8629 of January 7, 1941, and No. 8734 of April 11, 1941, are hereby amended accordingly, and any conflicting provisions of these or other Executive Orders are hereby rescinded.

Franklin D. Roosevelt.

The White House, August 28, 1941.

[fol. 101]

(No. 9024)

Establishing the War Production Board in the Executive Office of the President and Defining Its Functions and Duties.

By virtue of the authority vested in me by the Constitution and statutes of the United States, as President of the United States and Commander in Chief of the Army and Navy, and in order to define further the functions and duties of the Office for Emergency Management with respect to the state of war declared to exist by Joint Resolutions of the Congress, approved December 8, 1941, and December 11, 1941, respectively, and for the purpose of assuring the most effective prosecution of war procurement and production, it is hereby ordered as follows:

1. There is established within the Office for Emergency Management of the Executive Office of the President a War



Production Board, hereinafter referred to as the Board.

2. The Chairman of the War Production Board, with the advice and assistance of the members of the Board, shall:

a. Exercise general direction over the war procurement and production program.

b. Determine the policies, plans, procedures, and methods of the several Federal departments, establishments, and agencies in respect to war procurement and production, including purchasing, contracting, specifications, and construction; and including conversion, requisitioning, plant expansion, and the financing thereof; and issue such directives in respect thereto as he may deem necessary or appropriate.

c. Perform the functions and exercise the powers vested in the Supply priorities and Allocations Board by Executive Order No. 8875 of August 28, 1941.

7. The Supply Priorities and Allocations Board established by the Executive Order of August 28, 1941, is hereby abolished, and its personnel, records, and property transferred to the Board. The Executive Orders No. 8629 of January 7, 1941, No. 8875 of August 28, 1941, No. 8891 of September 4, 1941, No. 8942 of November 19, 1941, No. 9001 [fol. 102] of December 27, 1941, and No. 9023 of January 14, 1942, are hereby amended accordingly, and any provisions of these or other pertinent Executive Orders conflicting with this Order are hereby superseded.

Franklin D. Roosevelt.

The White House, January 16, 1942.

Farm Loan Agency

Washington,  
January 12, 1942.

Federal Loan Administrator Jesse Jones today announced at the request of OPM and OPA, Metals Reserve Company has agreed to stimulate the production of zinc, lead and copper through paying a higher price for these metals for production in excess of 1941 output.

Details of the plan and quotas for individual producers will be announced by the Price Administrator.

Mr. Jones' letter to William S. Knudsen and Leon Henderson follows:

January 12, 1942.

"GENTLEMEN: You are advised that, in accordance with your suggestion, Metals Reserve Company will, at your request, for a period of two and one-half years from February 1, 1942, pay 11 cents per pound East St. Louis for zinc, 9 $\frac{1}{4}$  cents per pound New York for lead, and 17 cents per pound Connecticut Valley for copper, for increases above 1941 production governed by quotas to be fixed by you with our approval.

. . . . .

"Any metals so acquired by Metals Reserve Company which are not used for or by the government will be subject to your allocation at the ceiling price fixed by the Price Administrator. By this procedure we should get maximum production of these critical and strategic metals for war purposes without increasing the price to the consumer.

"Sincerely yours, Jesse H. Jones, Administrator."

[fol. 103] United States Code Annotated, Title 50:

App. Sec. 633. Amendment of section 1152 of this Appendix.

Subsection (a) of section 2 of the Act of June 28, 1940 (54 Stat. 676) (section 1152 (a) of this Appendix), entitled "An Act to expedite national defense, and for other purposes", as amended by the Act of May-31, 1941 (Public Law Numbered 89, Seventy-seventh Congress), is hereby amended . . . . .

. . . . .

. . . Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

## Emergency Price Control Act of 1942 (New)

Act Jan. 30, 1943, C. 26, 56 Stat. 23

## Sec. 901. Purposes; time limit; applicability.

(a) It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local gov- [fol. 104] ernments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3 (section 903 of this Appendix); and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. It shall be the policy of those departments and agencies of the Government dealing with wages (including the Department of Labor and its various bureaus, the War Department, the Navy Department, the War Production Board, the National Labor Relations Board, the National Mediation Board, the National War Labor Board, and others heretofore or hereafter created), within the limits of their authority and jurisdiction, to work toward a stabilization of prices, fair and equitable wages, and cost of production.

• • • • •

Section 902. Prices, rents, and market and renting practices.

• • • • •

(e) Whenever the Administrator determines that the maximum necessary production of any commodity is not being obtained or may not be obtained during the ensuing year, he may, on behalf of the United States, without regard to the provisions of law requiring competitive bidding, buy or sell at public or private sale, or store for use, such commodity in such quantities and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof or otherwise to supply the demand therefor, or make subsidy payments to domestic producers of such commodity in such amounts and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof: Provided, That in the case of any commodity which has heretofore or may hereafter be defined as a strategic or critical material by the President pursuant to section 5d of the Reconstruction Finance Corporation Act, as amended (Title 15, Secs. 616b, 609j), such determinations shall be made by the Federal Loan Administrator, with the approval of the President, [fol. 105] and, notwithstanding any other provision of this Act or of any existing law, such commodity may be bought or sold, or stored or used, and such subsidy payments to domestic producers thereof may be paid, only by corporations created or organized pursuant to such section 5d (Title 15, Secs. 606b, 609j); except that in the case of the sale of any commodity by any such corporation, the sale price therefor shall not exceed any maximum price established pursuant to subsection (a) of this section which is applicable to such commodity at the time of sale or delivery, but such sale price may be below such maximum price or below the purchase price of such commodity, and the Administrator may make recommendations with respect to the buying or selling, or storage or use, of any such commodity. • • •

## Title II—Administration and Enforcement

### Sec. 921. Administration.

(a) There is hereby created an Office of Price Administration, which shall be under the direction of a Price Administrator (referred to in this Act as the "Administrator").  
• • •

## Inflation Control Act of 1942 (New).

Act Oct. 2, 1942, C. 578, 56 Stat. 765.

Section 961. Stabilization by President of prices, wages, and salaries affecting cost of living; public utility rate increases.

In order to aid in the effective prosecution of the war the President is authorized and directed, on or before November 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost of living; and, except as otherwise provided in this Act, such stabilization shall so far as practicable be on the basis of the levels which exist on September 15, 1942. The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: Provided, That no common carrier or other public utility shall make [fol. 106] any general increase in its rates or charges which were in effect on September 15, 1942, unless it first give thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase. October 2, 1942, c. 578, Sec. 1, 56 Stat. 765.

## Office of Price Administration.

(For immediate release Monday, February 9, 1942) PY 2458.

Rules and regulations by which United States mining operators may obtain premium prices for overquota production of copper, lead, and zinc were announced today by William L. Batt, Director of Materials, War Production Administration, and Leon Henderson, Administrator of Price Administration.

Premium prices of 17 cents per pound for copper, 11 cents for zinc, 9½ cents for lead will be paid by the Metals Reserve Company for a period of 2½ years beginning February 1, 1942. Should the emergency end before the termination date, Metals Reserve Company has reserved the right to terminate this arrangement on equitable terms.

The premiums will apply to all overquota production after February 1, 1942, regardless of when tonnage quotas are

announced and actual payments begin. By continuing meanwhile to ship through ordinary channels, producers will be assured premium prices for overquota production.

. . . . .

Purpose of the plan is to expand output of copper, lead, and zinc because of their importance in the production of armaments.

In general, quotas will be fixed to include all output that can reasonably be expected at established market prices for the metals of 12 cents per pound for copper, 8.25 cents for zinc, and 6.50 cents for lead.

Purpose of the premium plan is to compensate operators [fol. 107] for extra costs involved in bringing out additional metal output.

. . . . .

Text of the joint statement is as follows:

“Joint Statement—War Production Board—

Office of Price Administration

“Premium Price Plan for Copper, Lead, and Zinc

“The expansion of the armament program following the entry of the United States into the war has made it imperative that unusual steps be taken to increase further the output of copper, lead, and zinc because of their prime importance in the production of armaments.

“Rules and regulations governing the application of the premium-price plan under which Metals Reserve Company has announced that it will pay premium prices for production of copper, zinc, and lead in excess of quotas to be established by W. P. B., and O. P. A., were released today by William L. Batt, Director, Materials Division of the War Production Board, and Leon Henderson, Administrator, Office of Price Administration:

“The premium-price plan has been established to make it possible quickly to increase production by mining low-grade submarginal ores, and to develop additional ore reserves.

“Premium prices of 17 cents for copper, 11 cents for zinc, and  $9\frac{1}{4}$  cents for lead will be paid for a period of  $2\frac{1}{2}$  years beginning February 1, 1942, and ending July 31, 1944.



Should the emergency end before July 31, 1944, Metals Reserve Company has stated that it will reserve the right to terminate this arrangement on equitable terms to be announced in the near future.

Particular attention is called to the fact that premium prices will apply to all overquota production after February 1, 1942, regardless of the time when tonnage quotas are announced and actual payments begin. By continuing meanwhile to ship-through ordinary channels producers will be assured premium prices for overquota production.

[fol. 108] It is also stated that except as provided in sections 5a and 5b of the ensuing instruction, it is the intention that quotas will be fixed to include all output that can reasonably be expected to come out at the established maximum prices of 12 cents for copper, 8.25 cents for zinc, and 6.5 cents for lead. The only purpose of the premium price plan is to compensate for extra costs involved in bringing out additional metal output.

"Labor and management should recognize this act," Mr. Batt stated, "and should cooperate to facilitate production of additional material which will help to promote the satisfaction of the war requirements and to minimize unemployment in the metal fabricating industries due to present shortages."

The principal rules and regulations are as follows:

1. The premium price plan is one of the steps taken to increase production. In accordance with this plan, the Metals Reserve Company has announced that it will pay, for a period of 2½ years beginning February 1, 1942, and ending July 31, 1944, premium prices for the production of copper, lead, and zinc in excess of quotas to be established jointly by War Production Board and Office of Price Administration. These premium prices will be based on 17 cents for copper, 11 cents for zinc, and 9¼ cents for lead.

2. The premium price plan went into operation February 1, 1942. Regardless of the time at which tonnage quotas are announced and regardless of the time at which actual payments under the plan begin, premium payments shall be made for all overquota production in February and subsequent months.

3. A joint committee from the War Production Board and the Office of Price Administration shall fix initial quotas.

4. Quotas shall be established for particular mines or groups of mines herein referred to as a "property", and shall be expressed in terms of a property's monthly rate of production. A property's production shall be included in determining its quota and overquota regardless of whether [fol. 109] that production is converted into metals, metal oxides, or other products.

6. Should any property fail to maintain its quota production in any month or months, premium payments will not be made until the accumulated deficit is made up by over-quota production in subsequent months. Material deficits due to major calamities such as floods or fires will not be so accumulated. If conditions develop which make it impossible for the quota production of a property to be maintained, the Government will consider applications for reduction of the quota. However, the Government reserves the right to restore any initial quota which has been reduced.

13. Premium payments will be based upon metal paid for under the terms of settlement contracts. Quotas, of course, will be fixed on the same basis. If no settlement contracts exist, quotas and premium payments will be computed on the basis of 95, 90, and 85 percent of the metal content in the case of copper, lead, and zinc, respectively. Ores from mines from integrated companies will be treated in the same manner.

#### General Administrative Order No. 2-34.

#### War Production Board Manual of Policy and Procedures

Effective date: May 1, 1942.

Subject: Director of Materials.

Section 1. The Director of Materials is responsible for the administration of the premium price plan for copper,

lead, and zinc. Quotas under the premium price plan shall be fixed by agreement between the Director of Materials and the Office of Price Administration.

D. M. Nelson

§

[fol. 110] Program for Premium Payments by Metals Reserve Company on Production of Copper, Lead and Zinc in Excess of Monthly Production Quotas.

In effecting the program originally announced by the Honorable Jesse H. Jones on January 12, 1942, Metals Reserve Company will pay a premium on all domestic production of copper, lead and zinc in excess of monthly quotas established by the War Production Board and the Office of Price Administration and approved by Metals Reserve Company, which will reflect the difference between the respective ceiling prices for the materials involved and the equivalent of 17¢ per pound Connecticut Valley for copper, 91¢ per pound New York for lead, and 11¢ per pound East St. Louis for zinc.

With regard to excess production from the usual "custom ores," various smelting companies throughout the United States have been designated as agents for Metals Reserve Company to obtain and transmit to it the necessary data required for the making of the premium payments. Each producer representing himself as eligible for any premium payment in any month must (1) cause the smelting company to which he ships to be furnished, as agent for Metals Reserve Company, with a sworn producer's affidavit (forms thereof can be obtained by the producer from the smelting company) showing, among other things, the amount of material in excess of quota delivered during the month covered by such affidavit for which he has been paid or will be paid and on which he is eligible for a premium, and (2) cause the smelting company to be furnished with all necessary information so as to enable it to supply Metals Reserve Company with a statement setting out all data required for the making of the premium payments.

Following receipt in each month of its agents' and representative's statements, together with the sworn producers' affidavits, Metals Reserve Company will arrange for the premium payments to be made promptly to the producers.

A principal requirement of the program is that any deficiency in monthly deliveries below the monthly production [fol. 111] quota of any producer must be made up in the next succeeding month or months before such producer can receive any premium payment on excess quota production, and the producer's affidavit will be required to show that such deficiency has been made up.

Should the National Emergency come to an end prior to July 31, 1945, Metals Reserve Company will give notice of its intention to terminate the premium program thirty days from the date of the giving of such notice.

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[Note. Blank form of affidavit of producer not reproduced here as it appears at printed page 60.]

### Supplementary Regulation No. 4

7 F. R. 3724

#### "Supplementary Regulation No. 4 to General Maximum Price Regulation—Exceptions

The Price Administrator, pursuant to authority contained in the Emergency Price Control Act of 1942, has determined that in order to effectuate the purposes of that Act, sales or deliveries to the United States or any agency thereof of certain commodities and in certain transactions, and certain other commodities, should be excepted from the General Maximum Price Regulation. Provision for such exception is made in Secs. 1499.9 (a) (16) and 1499.9 (b) (8) and (9) of the General Maximum Price Regulation. A statement of the considerations involved in the issuance of this Supplementary Regulation, issued simultaneously herewith, has been filed with the Division of the Federal Register. For the reasons set forth in that statement, under the authority vested in the Price Ad-

administrator by the Emergency Price Control Act of 1942, and pursuant to Secs. 1499.9 (a) (16), and 1499.9 (b) (8) and (9) of the General Maximum Price Regulation, Supplementary Regulation No. 4 is hereby issued.

Sec. 1499.29. Exceptions for sales and deliveries to the [fol. 112] United States or any agency thereof of certain commodities and in certain transactions and for certain other commodities. (a) General Maximum Price Regulations shall not apply to sales or deliveries of the following commodities or in the following transactions:

\* \* \* \* \*

(11) Sales or deliveries of metallic copper, lead, or zinc, or of ores or concentrates containing copper, lead or zinc, to the Metals Reserve Company, or its duly authorized agent or agents pursuant to the premium price plan announced by the Federal Loan Agency, the War Production Board, and the Office of Price Administration.

\* \* \* \* \*

This Supplementary Regulation No. 4 (Sec. 1499.29) shall become effective May 18, 1942.

(Pub. Law 421, 77th Cong.)

Issued this 13th day of May, 1942.

Leon Henderson, Administrator.

[F. R. Doc. 42-4504; Filed, May 16, 1942; 12:48 p. m.]

### Charter of Metals Reserve Company

6 F. R. 2970 as amended by 6 F. R. 5464

"Whereas, Reconstruction Finance Corporation is authorized pursuant to an Act of Congress approved June 25, 1940, to create corporations in order to aid the government of the United States in its national-defense program with power to produce, acquire, and carry strategic and critical materials, as defined by the President; and

Whereas, the President has defined as strategic and critical materials those set forth in Article Third hereof;

Now, therefore, it is stated that:

First. Reconstruction Finance Corporation does hereby create a corporation to be known as Metals Reserve Company.

Second. The location of the principal office of the corporation [fol. 113] shall be in the City of Washington, District of Columbia.

\*Third. The objects, purposes and powers of the Corporation shall be:

(a) To produce, acquire, carry, sell, or otherwise deal in strategic and critical materials as defined by the President;

(b) To purchase and lease land; purchase, lease, build and expand plants; purchase and produce equipment, facilities, machinery, materials, and supplies for the manufacture of strategic and critical materials, arms, ammunition, and implements of war, any other articles, equipment, facilities, and supplies necessary to the national defense, and such other articles, equipment, supplies, and materials as may be required in the manufacture or use of any of the foregoing or otherwise necessary in connection therewith;

(c) To lease, sell, or otherwise dispose of such land, plants, facilities, and machinery to others to engage in such manufacture;

(d) To engage in the manufacture of arms, ammunition, and implements of war;

(e) To produce, lease, purchase, or otherwise acquire railroad equipment (including rolling stock), and commercial aircraft, and parts, equipment, facilities and supplies necessary in connection with such railroad equipment and aircraft, and to lease, sell, or otherwise dispose of the same;

(f) To purchase, lease, build, expand, or otherwise acquire facilities for the training of aviators and to operate or

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\*Third. As amended "upon request of the Federal Loan Administrator, with the approval of the President of the United States," October 22, 1941.



lease, sell, or otherwise dispose of such facilities to other to engage in such training; and

(g) To take such other action as the President and the Federal Loan Administrator may deem necessary to expedite the national defense program.

The Corporation shall have power and authority to do and perform all acts and things whatsoever which are necessary, suitable, convenient or proper in connection with [fol. 114] or incidental to the foregoing objects, purposes and powers, including but without limitation, the power to borrow and hypothecate, to lend money, to adopt and use a corporate seal, to make contracts, to acquire, hold and dispose of real and personal property, and to sue and be sued in any court of competent jurisdiction.

Fourth. The total authorized capital stock of the corporation shall be five million dollars (\$5,000,000) of which one million dollars (\$1,000,000) shall be paid in immediately and the balance as called. Such stock shall be of one class and be issued for cash only. Said stock shall be transferable only with the approval of the Board of Directors of Metals Reserve Company. Reconstruction Finance Corporation shall subscribe for all the capital stock of the corporation.

Fifth. The corporation shall have existence until dissolved by act of the Board of Directors of Reconstruction Finance Corporation.

Sixth. The stockholders shall not be liable for the debts, contracts or engagements of the corporation except to the extent of unpaid stock subscriptions.

Seventh. The corporation shall be managed by its Board of Directors, officers and agents pursuant to this Charter and the provisions of the By-laws of Metals Reserve Company as prescribed by the Board of Directors of Reconstruction Finance Corporation.

Eighth. This Charter and the By-laws may be amended at any time by the Board of Directors of Reconstruction Finance Corporation.

\*\*Ninth. The Corporation, including its franchise, its capital, reserves, *surplus*, and income shall be exempt from all taxation (which shall, for all purposes, be deemed to

include sales, use, storage, and purchase taxes) now or hereafter imposed by the United States, or any territory, dependency or possession thereof, or by any State, County, municipality or local taxing authority, except that any real property (or buildings which are considered by the laws of [fol. 115] any State to be personal property for taxation purposes) of the Corporation shall be subject to State, territorial, county, municipal or local taxation to the same extent according to its value as other real property is taxed.

In witness whereof, Reconstruction Finance Corporation has caused this Charter to be signed by its executive officer, Chairman of its Board of Directors, attested by its Secretary, and has caused its seal to be hereunto affixed this 28th day of June, 1940.

Reconstruction Finance Corporation, by Emil Schram, Chairman. (Seal)

Attest: G. R. Cooksey, Secretary.

[F. R. Doc. 41-3658; Filed, May 22, 1941; 9:28 a. m.]

[F. R. Doc. 41-8007; Filed October 23, 1941; 3:57 p. m.]

#### Section 5d Reconstruction Finance Corporation Act, as Amended

(48 Stat., chap. 653, pp. 1108-1109; 49 Stat., chap. 2, pp. 4-5.)

Sec. 5d. In order to aid the Government of the United States in its national-defense program, the Corporation is authorized—

(3) When requested by the Federal Loan Administrator, with the approval of the President, to create or organize, at any time prior to July 1, 1943, a corporation or corporations, with power (a) to produce, acquire, carry, sell, or otherwise deal in strategic and critical materials as defined by the President; (b) to purchase and lease land, purchase, lease, build, and expand plants, and purchase and produce equipment, facilities, machinery, materials, and supplies for

**\*\*Ninth.** As inserted in said charter "upon request of Federal Loan Administrator with the approval of the President of the United States" October 22, 1941.

the manufacture of strategic and critical materials, arms, ammunition, and implements of war, any other articles, equipment, facilities, and supplies necessary to the national defense, and such other articles, equipment, supplies, and materials as may be required in the manufacture or use of any of the foregoing or otherwise necessary in connection [fol. 116] therewith; (c) to lease, sell, or otherwise dispose of such land, plants, facilities, and machinery to others to engage in such manufacture; (d) to engage in such manufacture itself, if the President finds that it is necessary for a Government agency to engage in such manufacture; (e) to produce, lease, purchase, or otherwise acquire railroad equipment (including rolling stock), and commercial aircraft, and parts, equipment, facilities, and supplies necessary in connection with such railroad equipment and aircraft, and to lease, sell, or otherwise dispose of the same; (f) to purchase, lease, build, expand, or otherwise acquire facilities for the training of aviators and to operate or lease, sell, or otherwise dispose of such facilities to others to engage in such training; and (g) to take such other action as the President and the Federal Loan Administrator may deem necessary to expedite the national-defense program, but the aggregate amount of the funds of the Reconstruction Finance Corporation which may be outstanding at any one time for carrying out this clause (g) shall not exceed \$200,000,000:

Any corporation created or organized by the Corporation under the preceding paragraph is also authorized, with the approval of the President, to make payments against the purchase price to be paid for strategic and critical materials in advance of the delivery of such materials.

50 U. S. Code Ann. 311:

#### Executive Order No. 9250

Oct. 3, 1942, 7 F. R. 7871, as amended by Ex. Ord. No. 9281,  
Sept. 25, 1943, 8 F. R. 13083

Providing for the Stabilizing of the National Economy.

By virtue of the authority vested in me by the Constitution and the Statutes, and particularly by the Act of

October 2, 1942 (sections 961-971 of this Appendix), entitled "An Act to Amend the Emergency Price Control Act of 1942, to Aid in Preventing Inflation, and for Other Purposes" as amended by the Public Debt Act of 1943 (Public [fol. 117] Law 34—78th Congress) (sections 757b, 757c of Title 31, and sections 964, 964a of this Appendix), as President of the United States and Commander in Chief of the Army and Navy, and in order to control so far as possible the inflationary tendencies and the vast dislocations attendant thereon which threaten our military effort and our domestic economic structure, and for the more effective prosecution of the war, it is hereby ordered as follows:

#### Title I—Establishment of an Office of Economic Stabilization

1. There is established in the Office for Emergency Management of the Executive Office of the President an Office of Economic Stabilization at the head of which shall be an Economic Stabilization Director (hereinafter referred to as the Director).

#### Title V—Profits and Subsidies

2. The Director may direct any Federal department or agency including, but not limited to, the Department of Agriculture (including the Commodity Credit Corporation and the Surplus Marketing Administration), the Department of Commerce, the Reconstruction Finance Corporation, and other corporations organized pursuant to Section 5d of the Reconstruction Finance Corporation Act, as amended (sections 606b, 609j, of Title 15), to use its authority to subsidize and to purchase for resale, if such measures are necessary to insure the maximum necessary production and distribution of any commodity, or to maintain ceiling prices, or to prevent a price rise inconsistent with the purposes of this Order.

(Document No. 13454)

Part 1369—Metal Ores

(MPR 356)

## Royalties on Copper, Lead and Zinc Ores

In the judgment of the Price Administrator it is necessary and proper to establish maximum royalties to be paid [fol. 118] on the mining of copper, lead and zinc ores in order to ensure that money paid by the Metals Reserve Company under the Premium Price Plan shall not be dissipated but shall make possible greater production of copper, lead and zinc for the war effort. Such regulation is likewise necessary in order to restrain further increases in royalty payments which will so increase costs of production as to discourage the exploitation of marginal ores of copper, lead and zinc or compel the Metals Reserve Company, pursuant to the Premium Price Plan, to pay substantial larger amounts of public moneys in order to enable mine operators to bear the increased cost entailed in high royalties.

The Administrator has given due consideration to royalties on the mining of copper, lead, and zinc ores which were charged and paid between October 1 and 15, 1941, and relevant factors of general applicability. So far as practicable the Price Administrator has consulted with representatives of lessors and producers.

In the judgment of the Administrator the maximum royalties on copper, lead and zinc ores established by this regulation are and will be generally fair and equitable and will effectuate the purposes of the Emergency Price Control Act of 1942, as amended. A statement of the considerations involved in the issuance of this regulation, issued simultaneously herewith, has been filed with the Division of the Federal Register.

Sec. 1369.51. *Maximum prices payable on the mining of copper, lead and zinc ores.* Under the authority vested in the Price Control Act of 1942, as amended, and Executive Order No. 9250, Maximum Price Regulation No. 356 (Royalties on Copper, Lead and Zinc Ores), which is annexed hereto and made a part hereof, is hereby issued.

Authority: Sec. 1369.51 issued under Pub. Laws 421 and 729, 77th Cong.; E. O. 9250, 7 F. R. 7871.

## Maximum Price Regulation 356—Royalties on Copper, Lead and Zinc Ores

[fol. 119] *Sec. 2. Maximum royalties on copper, lead and zinc ores mined from properties and workings under lease on December 31, 1942.* The maximum royalty which may be paid or received on copper, lead and zinc ores mined from any property or working which was under lease on December 31, 1942, shall be a royalty determined according to the terms of the lease in effect on December 31, 1942. A lease shall be considered to have provided for the payment of a royalty determined on the basis of premium or bonus money if during 1942, or within normal settlement time thereafter, a royalty so determined was in fact paid for ores mined during 1942 from the property or working covered by such lease. In no case, however, shall any royalty be calculated, paid or received on the basis of premium or bonus money in excess of 5¢ per pound of copper, 2 $\frac{3}{4}$ ¢ per pound of lead, and 2 $\frac{3}{4}$ ¢ per pound of zinc, which is received from the Metals Reserve Company pursuant to the Premium Price Plan or a special contract with the lessee. Where premium or bonus money is paid by the Metals Reserve Company on the basis of production of concentrates, equivalent figures shall be used in lieu of 2 $\frac{3}{4}$ ¢ per pound of lead and 2 $\frac{3}{4}$ ¢ per pound of zinc. As of the date of the issuance of this regulation \$41.80 per ton for 80% lead concentrates and \$29.70 per ton for 60% zinc concentrates are the equivalent figures for the Tri-State District.

*Sec. 3. Maximum royalties on copper, lead and zinc ores mined from properties and workings not under lease on December 31, 1942.* \* \* \* No royalty shall, however, be calculated, paid or received on the basis of premium or bonus money in excess of 5¢ per pound for copper, 2 $\frac{3}{4}$ ¢ per pound for lead or 2 $\frac{3}{4}$ ¢ per pound for zinc, or equivalent figures if payment is on the basis of concentrates.

Issued this 1st day of April, 1943.

Prentiss M. Brown, Administrator.



[fol. 120] Chapter IX. War Production Board—Subchapter B

Director General for Operations

Authority: Regulations in this subchapter issued under P. D. Reg. 1, as amended, 6 F. R. 6680; W. P. B. Reg. 7 F. R. 561; E. O. 9024, 7 F. R. 329; E. O. 9040, 7 F. R. 527; E. O. 9125, 7 F. R. 2719; sec. 2a. Pub. Law 671, 76th Cong. as amended by Pub. Laws 89 and 507, 77th Cong.

7

Part 933—Copper

General Preference Order M-9-a as amended Mar. 4, 1943

Whereas the national defense requirements have created a shortage of copper, copper base alloys and products thereof, as hereinafter defined, for defense, for private account, and for export, and it is necessary in public interest and to promote the defense of the United States to conserve the supply and direct the distribution thereof:

Now, therefore, it is hereby ordered.

Sec. 933.2. General Preference Order M-9-a-(a) Definition. For the purpose of this order.

(1) "Copper" means copper metal which has been refined by any process of electrolysis or fire refining to a grade and in a form suitable for fabrication, such as cathodes, wire bars, ingot bars, ingots, cakes, billets, wedge bars or other refined shapes, or copper shot or other forms produced by a refiner.

\* \* \*

3. Refiner means any person who produces copper, as heretofore defined, from copper bearing material or scrap by any process of electrolysis or fire refining; "refiner" also includes any person who has such copper produced for him under toll agreement.

4. "Dealer" means one who receives physical delivery of copper and sells or holds the same for sale without change in form.

Fed. Reg. Mar. 5, 1943, p. 2751

b. Allocation of copper (1) Deliveries of copper by [fol. 121] dealers or refiners. No delivery of copper shall

be made by any dealer or refiner except upon presentation by the person requesting the delivery of an allocation certificate duly issued by the Director General for Operations (hereinafter called the Director); except that notwithstanding the foregoing, copper of foreign origin imported under bond or drawback agreement may be re-exported by a refiner pursuant to an export license duly issued by the Office of Export Control, B. E. W.

Issued this 4th day of March, 1943.

Curtis E. Calder, Director General for Operations.

F. R. Doc. 43-3384 Filed Mar. 4, 1943, 9:28 A. M.

## Title 32—National Defense

### Chapter IX. War Production Board

#### Subchapter B. Executive Vice Chairman

#### \* Part 933. Copper

Supplementary Order M-9-b, as amended Aug. 24, 1943.

Sec. 933.3 a \* \* \*

b

c

d Delivery to or acceptance of copper by foundries and makers of alloy ingots. Notwithstanding any preference rating, no person shall deliver any copper to a foundry or to a maker of alloy ingots, and no foundry or maker of alloy ingots shall accept any such delivery, except as specifically authorized by the War Production Board.

Issued this 24th day of Aug. 1943.

War Production Board, by J. Joseph Whelan, Recording Secy.

F. R. Doc. 43-13807, Filed Aug. 24, 1943, 11:33 A. M.  
(Fed. Reg. Aug. 23, 1943, p. 11715.)

## 80-5-41. Secretary and Assistants.

The state tax commission shall appoint a secretary, who may or may not be a member, and shall employ a cashier and such other persons as agents, statisticians, expert attorneys and other assistants and employees as may be necessary to perform its duties. (L. 31, p. 217, S. 5983 (g).)

## 80-5-46. General Powers and Duties.

The powers and duties of the state tax commission are as follows:

- (1) To sue and be sued in its own name.

. . . . .

## 80-5-66. Occupation Tax—Annual Exemption.

Except as herein otherwise specifically provided, every person engaged in the business of mining or producing ore containing gold, silver, copper, lead, iron, zinc or other valuable metal in this state shall pay to the State of Utah an occupation tax equal to one per cent of the gross amount received for or the gross value of metalliferous ore so which tax shall be in addition to all other taxes provided by law. Said tax shall be delinquent on the first day of January next succeeding the calendar year when the ore or metal is sold.

The basis for computing the occupation tax imposed by this act for any year shall be as follows:

(a) If the ore or metals extracted is sold under a bona fide contract of sale the amount of money or its equivalent actually received by the owner, lessee, contractor or other person operating the mine or mining claim from the sale of all ores or metals during the calendar year less a reasonable cost, if any, of transporting the ore from the place where mined to the place where, under the contract of sale, the ore is to be delivered.

(b) If the extracted ore is treated at a mill, smelter or reduction works which receives ores from independent sources and which is owned or controlled by the same person [fol. 123] interested in owning or controlling the mine or mining

claim, such disposal shall be treated as a sale within the meaning of this section for the purpose of determining gross proceeds or otherwise, and in such determination a rate or charge for sampling, assaying, milling and smelting the ores and extracting the metals and minerals therefrom shall be deducted which shall not exceed an amount to be determined by applying the same rates as are applied by such mill, smelter, or reduction works or competing works, to ores of substantially like character and in like quantities received from independent sources. In the event of controversy the tax commission shall have power to determine such rates or charges. Transportation charges may also be deducted as provided in subdivision (a) hereof.

(c) If a mill or other reduction works is operated exclusively in connection with a mine, such mill or reduction works shall be treated as a part of the mine and the cost of operating such mill or reduction works shall, for the purpose of fixing the occupation tax imposed by this act, be regarded as part of the cost of mining and cost of assaying, sampling, smelting, refining, and transportation, only, shall be deducted.

An annual exemption from the payment of the occupation tax imposed by this act upon \$20,000 in gross value of ore shall be allowed to each person, provided but one exemption shall be allowed for one claim or group of claims operating under one ownership as a mine.

#### 80-5-67. Statements

Every person engaged in the business of mining or producing metalliferous ore shall make and file with the tax commission, on or before the tenth day of February of each year beginning with the year 1938 on forms furnished by the tax commission, a statement containing:

(1) The name, description and location of the mine or mining claim owned and operated by him during the preceding calendar year.

(2) The number of tons of ore mined during the preceding calendar year and the disposition made of the same.

[fol. 124] (3) The total amount received during the preceding calendar year from the sale of ore and metals.

(4) If a deduction is claimed for milling, smelting, refining, marketing or transporting the ore or the products of the same from the place where produced to the place where sold, the amount of deduction claimed therefor.

The report shall be signed and sworn to by the individual producer, or by a member of the producing firm, if a partnership, or by the president, secretary or managing officer of the producer, if a corporation. Any wilful false swearing as to the purported material facts set out in such report shall constitute the crime of perjury and shall be punished as such under the criminal code of this state.

#### 80-5-68. Failure to File Statement

If any person engaged in the business of mining metaliferous ores refuses or neglects to make or deliver to the tax commission the statement required by this act the tax commission must fix the amount of the occupation tax from the best information or knowledge it can obtain.

#### 80-5-76. Jurisdiction of Supreme Court—Payment under Protest

No court of this state except the supreme court shall have jurisdiction to review, alter, or annul any decision of the tax commission or to suspend or delay the operation or execution thereof; provided, any taxpayer may pay his occupation tax under protest and thereafter bring an action in any court of competent jurisdiction for the return thereof as provided by section 80-11-11, Revised Statutes of Utah, 1933.

### Part 984

(General Preference Order M-38, as amended May 26, 1943.)

Section 984.1 General Preference Order M-38 is hereby amended to read as follows:

[fol. 125] The fulfillment of requirements for the defense of the United States has created a shortage in the supply of lead domestically produced for defense, for private account

and for export, and there exists an uncertainty as to future shipments of foreign lead to the United States. The following order is therefore, deemed necessary and appropriate in the public interest and to promote the national defense.

Section 984.1 General Preference Order M-38 (A) Definitions. For the purposes of this order:

(1) "Lead" means and includes lead metal (including antimonial lead) in refinery shapes, whether produced from foreign or domestic ores, from scrap or drosses or from other lead bearing material.

(2) "Lead base alloy" means any alloy containing 50% or more of lead metal by weight.

(3) "Refiner" means any person who produces lead as hereinbefore defined and includes any person who has such lead produced for him under toll agreement.

(4) "Dealer" means any person who procures lead either by importing or from domestic sources for sale or resale without change in form whether or not such person receives title to or physical delivery of the material, and includes selling to agents, warehousemen, and brokers.

• • • • •

#### (c) Delivery Schedule.

The War Production Board may from time to time issue special directions requiring any refiner or dealer to file a report on Form PD-124, showing a schedule of his proposed deliveries of lead to be made during any period specified in such directions and including such further information as may be required by instructions accompanying Form PD-124.

#### (2) Withheld Deliveries.

The War Production Board may from time to time require each refiner to set aside from his production of lead during any calendar month or other specified period (in-  
[fol. 126] cluding therein lead produced for him by others under toll agreement and excluding lead produced by him for others under toll agreement) a quantity to be determined and specified by the War Production Board and to,



*delivered* by such refiner only pursuant to the specific written authorization of the War Production Board. Any amount so set aside shall be excluded from the refiner's schedule of proposed deliveries filed under the provisions of subparagraph (c) (1) above.

. . . . .

#### (4) Basis of Allocation Directions.

Any allocations, directions or specific authorizations by the War Production Board pursuant to the provisions of paragraphs (c) (2) and (3) above, will be made primarily to insure satisfaction on all war requirements of the United States, both direct and indirect and they may be made in the discretion of the War Production Board without regard to any preference ratings assigned to particular contracts or purchase orders.

#### (5) Allotment on purchase orders.

The War Production Board may in its discretion require any person seeking to place a purchase order for lead to be delivered by refiner or dealer to place the same with one or more particular refiners or dealers.

. . . . .

#### (h) Revocation of M-38-(c).

Conservation Order of M-38-(c) as amended is hereby revoked.

Issued this 26th day of May, 1943.

War Production Board, by J. Joseph Whelan,  
Recording Secretary.

8 Federal Register #7008 for 1943.

[fol. 127]

Part 984—Lead

(Revocation of Conservation Order—M-38-a and M-39-b and M-38-d to i inclusive)

Issued on the 26th day of May, 1943.

War Production Board, by J. Joseph Whelan, Recording Secretary.

Citation: 8 Federal Register #7008 for 1943

## General Preference Order

M-11-a as amended December 22, 1942.

M-11-a (1) "Zinc oxide" means all grades of zinc oxide including lead free and leaked produced from ores, concentrates, metallic zinc or other primary metal and from soap, dross, ashes, skimmings or other secondary metals.

. . . . .

(d) Restrictions (1) Each producer of zinc oxide shall set aside from his production each month quantities of zinc oxide to be determined from time to time by the Director General of Operations to be delivered only upon express direction of the Director General of Operations.

. . . . .

(e) Any person who in any month cannot otherwise obtain zinc oxide in quantities required to fill his preference rated orders may apply for an allocation of zinc oxide for that month by filing with the War Production Board Ref. M-11-a not later than the 15th of the month preceding the month in which the allocation is desired, an application of Form PD-62.

This amendment shall take effect January 1, 1943.

P.D. Reg. 1, as amended, 6 F R 6680; W. P. B. Reg. 1; 7 F R 56 1; E O 9024; 7 F R—329; E. O. 9040; 7 F R—527; E. O. 9125; 7 F. R.—2719; Sec. 2(a) Pub. Law 671; 76 Cong. as amended; Pub. Laws 89 and 507, 77th Cong.

[fol. 128] Issued this 22nd day of December, 1942.

Ernest Kanzler, Director General of Operations.

7 F. R. 10776

[Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 129] IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF UTAH

Pleas and Proceedings before The Honorable Tillman D. Johnson, Judge of the United States District Court for the District of Utah, presiding in the following entitled cause:

No. 680—Civil

SILVER KING COALITION MINES COMPANY, a Corporation,  
Plaintiff, /

vs.

STATE TAX COMMISSION, AND J. LAMBERT GIBSON, ROSCOE E. HAMMOND, Milton Twitchell, and Heber Bennion, Jr., constituting said State Tax Commission, Defendants.

COMPLAINT—Filed Sept. 14, 1944

Plaintiff for its cause of action alleges:

1. The grounds upon which the jurisdiction of this court depends are as follows:

(a) Diversity of citizenship between the parties plaintiff and defendants as hereinafter set forth:

(b) The action arises under the constitution and laws of the of the United States, particularly Article 1, Section 8 of the Constitution of the United States empowering Congress to declare war and prosecute the same, and Article 1, Section 10 of the Constitution of the United States denying that power to the states; the Emergency Price Control Act of 1942, approved January 30, 1942, (56 Stat. 23, as amended October 2, 1942, 56 Stat. 767, 50 U. S. C. App. 901, 902(e)), the purpose of which, among others, was, and is, to secure the maximum necessary production of any commodity essential to the prosecution of the war and for that purpose to make subsidy payments to domestic producers in such amounts and in such manner and upon such terms and conditions as may be determined to be necessary to obtain such maximum necessary production; Executive Order [fol. 130] No. 9250, Title V, as amended by Executive Order 9281, (50 U. S. C. App. Section 901, p. 311), pursuant to authority conferred by said Emergency Price Control Act of 1942, by which order Metals Reserve Company, was, and is,

authorized to subsidize, if such measures be necessary to insure the maximum production and distribution of any commodity necessary to the successful prosecution of the war; the Second War Powers Act, being the Act of June 28, 1940 (54 Stat. 676), as amended March 27, 1942, c. 199, Title 111, Section 301, (56 Stat. 177, 50 U. S. C. App. Section 633, p. 274) whereby the President of the United States was, and is authorized to allocate all production in such manner; upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the National defense; and the Fourteenth Amendment to the Constitution of the United States, where it is provided that no State shall deprive any person of property without due process of law.

The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand (\$3,000.00) Dollars.

2. Plaintiff, Silver King Coalition Mines Company, is now and at all times hereinafter mentioned was, a corporation incorporated and existing under the laws of the State of Nevada and is now and at all times was, a citizen of the State of Nevada and no other State. The defendant, State Tax Commission, is a distinct legal entity created by Article XIII, Section 11 of the Constitution of the State of Utah, and by said Article XIII, Section 11 of said constitution there was vested in said State Tax Commission, solely and exclusively, the power, among others, of administering and supervising the tax laws of the State of Utah, of assessing mines and equalizing the valuation and assessment of property among and within the several counties, of establishing systems of public accounting, reviewing proposed bond issues, and of revising the tax levies and budgets of the local governmental units. And said provisions of the Constitution of the State of Utah were further effectuated by the Statutes of the State of Utah, more particularly c. 5 of Title 80, Utah Code 1943, especially Sections 80-5-37 to 80-5-55, inclusive, and 80-5-65 to 80-5-82, [fol. 131] inclusive, and said State Tax Commission was empowered thereby, more particularly by Sections 80-5-46 (1) and 80-5-76, Utah Code 1943, to sue and be sued in its own name in any court of competent jurisdiction, and by Section 80-5-41 to employ, among others, such attorneys, agents, statisticians, experts and other agents and employees as might be necessary in the performance of its

duties. Said defendant, State Tax Commission, is a citizen of the State of Utah, and no other state. Defendants, J. Lambert Gibson, Roscoe E. Hammond, Milton Twitchell, and Heber Bennion, Jr., are members of, and as such members at all times hereinafter alleged constituted, and now constitute, said State Tax Commission. Each of said defendants last named is a citizens of the State of Utah, and no other State.

3. The controversy herein is wholly between citizens of different States, and the matter in controversy exceeds the sum of \$3,000.00, exclusive of interest and costs.

4. Plaintiff, Silver King Coalition Mines Company, is a mining corporation, is and has been the owner of and operating under certain mines and mining claims and mining properties, near the City of Park City, Uinta Mining District, County of Summit, State of Utah, and for the reduction of ores mined and produced from plaintiff's said mines and mining claims plaintiff is and has been the owner of a milling plant as part of said mining properties. Said milling plant being situated in the vicinity of the said mines of the plaintiff near the city, in the mining district, county and state aforesaid. That at all times herein mentioned and over the period herein referred to, the plaintiff has reduced at its said mill, the ores mined from its said mines and mining claims to a metallic concentrate. That plaintiff's said mines and mining claims and mining operations aforesaid, among other metals yields and produces lead, zinc and copper concentrates.

5. April 11, 1941, the President of the United States, by his Executive Order No. 8734 as amended by his Executive Order No. 8875 August 28, 1941, (Vol. 9, U. S. C. Cong. Ser. 1941, pp. 852, 867), created the Office of Price Administration, established an Administrator as its head and defined the Administrator's duties, among which duties was that of [fol. 132] prescribing maximum prices and all elements of cost or price of materials or commodities and enforcing their observance; and pursuant to authority thus conferred price schedules were established August 12, 1941 and it was thereby provided, among other things, that no person should sell or offer to sell, buy or offer to buy, or accept delivery of lead, zinc, and copper at prices higher than the following maximum price per pound: Lead, six and one-

half cents per pound; Zinc, eight and one-fourth cents per pound; Copper, twelve cents per pound. And by the signature of the President, on January 30, 1942, the Emergency Price Control Act of 1942 became law (c. 26, 56 Stat. 23; 50 U. S. C. App. Section 901, p. 310). And by said Act said Price Administrator was empowered, on behalf of the United States, in such manner and upon such terms and conditions as he should determine to be necessary to obtain the maximum necessary production of any commodity essential to the successful prosecution of the war, to make subsidy payments to domestic producers of such commodities in such amounts and in such manner and upon such terms and conditions as he should determine to be necessary to obtain such maximum necessary production thereof, (50 U. S. C. App. Section 902(e), p. 319. Metals Reserve Company is, and at all the times herein mentioned was, a corporation created pursuant to Title XV, U. S. C. Section 606 (b), being Section 5 (d) of the Reconstruction Finance Corporation Act as amended (15 U. S. C. Section 606(b), 609(j)), and as such an Agency of the United States. And by said Emergency Price Control Act of 1942 it was provided that "such commodities may be bought or sold, or stored or used, and such subsidy payments to domestic producers thereof may be paid, only by corporations created or organized pursuant to such Section 5(d), except that in the case of the sale of any commodity by any such corporation, the sale price therefor shall not exceed any maximum price established pursuant to subsection (a) of this section (50 U. S. C. App. Section 902(a), p. 319), which is applicable to such commodity at the time of sale or delivery." And the President of the United States made his Executive Order No. 9250, Title V, as amended by his Executive Order No. 9281, (50 U. S. C. App. Section 901, p. 311), and pursuant to the authority conferred upon him by [fol. 133] said Emergency Price Control Act of 1942 created the Office of Economic Stabilization, and at the head of said office he established an Economic Stabilization Director and authorized said Director to direct said Metals Reserve Company, among others of said corporations created or organized pursuant to said Section 5(d), to use its authority to subsidize, where such measure necessary to insure the maximum necessary production of any commodity.



6. That at all times herein mentioned and over the period referred to, the plaintiff has sold F.O.B. Park City, Utah, to the American Smelting and Refining Company, a corporation, all the said lead, zinc and copper produced from its said mining claims and reduced to concentrates at its said mill, on a sampled metal content basis, at the price (less fixed smelting and treating charges) fixed and established by the Office of the Price Administrator as the maximum selling price thereof as aforesaid. The purchase price for said concentrates from the said purchaser being due and payable and owing the plaintiff the date of invoice and shipment.

7. It being found that under said established price ceilings, costs to be encountered in the production of lead, zinc and copper and other metals essential to the successful prosecution of the war were too high to insure the maximum necessary production required for armament and other purposes of war, and lead, zinc and copper and said other metals, in such maximum necessary production being indispensable for said purposes, and stimulation of production of said metals to said maximum necessary production being imperative and being possible only by raising the ceiling prices or by payments of a subsidy for such increased production, the National government, impelled by the war emergency and impelled by the exigencies of war, paid, and still pays, subsidies for production of said metals in excess of quotas established jointly by the War Production Board and the Office of Price Administration. Said subsidies were, and are being, paid by order of the Office of Price Administration, dated February 9, 1942, No. P.M. 2458, and under and pursuant to said order and by virtue of the authority hereinbefore alleged, said Metals Reserve [fol. 134] Company pays, and has paid, a subsidy of two and *three-fourth* cents per pound for lead and two and *three-fourths* cents per pound for zinc and five cents per pound for copper production over and above said fixed quotas, commencing February 1, 1942. Under this subsidy plaintiff was allotted a quota of 150 tons of lead per month, 125 tons of zinc per month and zero on copper for its said mine and mining properties here involved, and it was provided, among other things, that should said mining property fail to maintain its quota production in any calendar month or months, no subsidy would be paid until the accumulated

deficit was made up by over quota production in subsequent months.

8. Said purchaser's payments for said lead, zinc and copper concentrates sold precede said subsidy payments by approximately thirty days. Subsidy payments are in no manner related to the sale of said *concentrates* but are paid by the said Metals Reserve Company for the sole purpose of stimulating production over and above said maximum quota and without regard to the sale or other disposition of the product, nor are said subsidy payments reflected in the product's value.

9. By act of Congress (Revenue Act of 1942, Sections 209, 735, 26 U.S.C. Supp., p. 216) the subsidy payments here involved were defined as special allowances, not income for the purpose of excess profit tax under the Federal Revenue Act. One of the aims of said subsidy plan being that of compensating the mine owner thereby for losses to be incurred by forced or excess mines production.

10. Plaintiff was paid and received during the calendar year 1943, on account of said subsidy payments made by Metals Reserve Company, under the authority heretofore alleged and upon plaintiff's excess lead, zinc and copper production over quota aforesaid from its mining claims, for the said year 1943, the sum of \$453,353.54.

11. At all times herein mentioned it was provided by the Statutes of Utah, that is to say, Section 80-5-66, Utah Code 1943, that "every person engaged in the business of mining or producing ore containing gold, silver, copper, lead, iron, [fol. 135] zinc, or other valuable metals in the State of Utah should pay to the State of Utah an occupation tax equal to one per cent of the gross amount received for, or the gross value of, metalliferous ores sold "during the next preceding calendar year; and it was thereby provided that the basis for computing said occupation tax should be the amount of money, or its equivalent, actually received from the sale of all ores or metals during said calendar year. Every person engaged in the business of mining has been, and is, required to make and file with the defendant, State Tax Commission, each year a statement containing the total amount received during the preceding calendar year from the sale of ores and metals (Section 80-5-67 (3), (4)), and

plaintiff filed with the defendant, State Tax Commission, in due time its statement accordingly.

12. Notwithstanding the facts hereinbefore alleged, said defendant, State Tax Commission, and said other defendants comprising said Commission, erroneously added the said sum of \$453,353.54, the amount of said subsidy payments received by plaintiff as hereinbefore alleged, to the gross amount received by plaintiff from sales of its production made during the calendar year 1943, as though the said sum of \$453,353.54 were actually derived from such sales. Upon the total so obtained, said defendant, State Tax Commission, and said other defendants constituting the membership thereof, have erroneously and without authority of law levied against plaintiff an occupation tax for the year 1944 in the sum of \$18,503.37 as though upon sales of metals made by plaintiff in the year 1943. But the total of plaintiff's sales of metals made during the year 1943 on which said occupation tax should have been computed amounted to the sum of \$1,396,983.32, and thereupon an occupation tax of no more than the sum of \$13,969.83 could have been lawfully levied against this plaintiff, the said sum of \$453,353.54, the amount of said subsidy payments, having been made and received neither for nor on account of "metaliferous ores sold", nor were said subsidy payments in any manner related to sales of any kind or character whatever.

13. That on the 25th day of May, 1944, plaintiff duly remitted and paid the defendant the said sum of \$13,969.83 or [fol. 136] that part and portion of said occupation tax levied and assessed and computed against the sum of \$1,396,983.32, which latter sum represented the amount received by the plaintiff from the actual sale of the said concentrates during the calendar year of 1943 and within the time and in the manner provided by law, to-wit, on the 27th day of May, 1944, the plaintiff filed with the defendant its written petition for the abatement of the unlawful assessment of said tax in the amount of \$4,533.54 and protested the assessment of the same upon the grounds herein alleged and demanded a hearing thereon and thereupon on June 1st, 1944, obtained and received from the defendants, an extension of time within which to pay the said protested portion of said tax. On the 29th day of July, 1944, the defendants denied plaintiff's said petition and protest and unlawfully levied against the plaintiff upon said unlawful assessment a so-

called mine occupation tax for the year 1944 in the sum of \$18,503.37 of which the sum of \$4,533.54 was levied upon the said subsidy paid plaintiff by the national government as aforesaid and said defendants, State Tax Commission, did on the 1st day of August, 1944, and within the extension of time granted for the payment thereof, collect from this plaintiff as and for said tax in part unlawfully levied pursuant to the said unlawful assessment made by the State Tax Commission and said other defendants as hereinbefore alleged, in the further sum of \$4,533.54.

14. The Congress of the United States has conferred no right upon the State to tax said subsidy payments, or to seize or appropriate the same, or any part thereof, or in any manner, or at all, to make said subsidies as source of revenue to the State. The inclusion by the said defendants of said sum of \$453,353.54 in said base upon which said occupation tax was computed by the defendant, State Tax Commission, and said other defendants, and upon which said assessment was made by it and them, and the levy thereupon of said additional tax of \$4,533.54 by it and them, were and are beyond the power or authority of said State Tax Commission or said other defendants, were and are contrary to law, and were and are void. Said attempted and unlawful assessment by said State Tax Commission and said other defendants, and said levy thereupon were [fol. 137] and are an usurpation of power, were and are an unlawful seizure by said defendants of subsidies paid by the national government in the interest of national defense and to further the prosecution of war, were and are an immediate and a direct and substantial interference with, and burden, upon the national government and the exercise by the national government of its legitimate function of prosecuting war, were and are an unlawful seizure by the defendants of subsidy payments the national government directed be paid to this defendant in the exercise by the national government of its power to wage war and, if permitted, the power of Congress to wage war will be impaired and may be destroyed by the act of others. Not only were said subsidy payments made by the national government to this plaintiff to insure the maximum necessary production of essential metal for use by the national government in the waging of war, to induce this plaintiff and other like industries to enter upon an operation in behalf of the national

government and its legitimate function of prosecuting war, and as such secure under the law against seizure by the States or others, but said seizure by said defendants was, and is, wholly without authority from the State of Utah or otherwise or at all, wholly in excess of the power of said defendants, or any of them, was, and is, an arbitrary usurpation of power and a taking of plaintiff's property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and of Section 7 of Article 1 of the Constitution of the State of Utah.

15. This plaintiff further alleges that at the time hereinbefore alleged, to-wit, on the 29th day of July, 1944, when said defendant, State Tax Commission, exacted final payment by this plaintiff of said total sum of \$18,503.37, this plaintiff did pay on the 1st day of August, 1944, the balance of said tax in said total sum to the defendant, State Tax Commission, but as to said portion thereof levied upon said unlawful assessment, to-wit, the sum of \$4,533.54 levied upon said subsidy payments in the sum of \$453,353.54, plaintiff made said payment under protest, demanded that said defendant make the record of its office show payment under protest accordingly, which said defendant did, and said sum [fol. 138] accordingly was not carried into the general fund of the State, but was, and is, being held and retained, as by law provided, until it shall have been finally determined that said tax was lawfully or was unlawfully collected.

Wherefore, plaintiff prays judgment against said defendant State Tax Commission, and said other defendants for the sum of \$4,533.54, together with interest thereon at the rate of six per cent per annum from the 1st day of August, 1944, and for plaintiff's costs of suit in this behalf incurred.

Silver King Coalition Mines Company, by S. B. Lamkin, Secretary.

R. J. Hogan, Attorney for Plaintiff, 316 Kearns Building, Salt Lake City, Utah.

(Duly verified.)

## IN UNITED STATES DISTRICT COURT

STIPULATION—Filed September 29, 1944

It is hereby stipulated by the parties hereto, through their respective counsel, that this cause of action and that action in this court entitled: Civil Action No. 671, Kennecott Copper Corporation, a corporation, Plaintiff, vs. State Tax Commission, et al. Defendants, may be consolidated for the purpose of trial in this court.

Dated this 28th day of September, 1944.

C. C. Parsons, Attorney for the Plaintiff Kennecott Copper Corporation. R. J. Hogan, Attorney for the Plaintiff Silver King Coalition Mines Company. Grover A. Giles by A. H. Nielsen, Attorney for Defendants in both actions.

[fol. 139] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed September 29, 1944

Come now the defendants and move the court to dismiss this action on the following grounds:

1. That the court has no jurisdiction over the subject matter of the action for the reason that the matter involved herein is not a controversy between citizens of different states in this, that this suit is in fact against the State of Utah and the State of Utah is not a citizen of any state within the meaning and intent of the law defining this court's jurisdiction;

2. That the court has no jurisdiction over the persons of these defendants for the reason that the State Tax Commission is an agency of the State of Utah and the individual defendants are sued in their representative capacity as members of the State Tax Commission; and that it appears from the body of the complaint that the matter involved is one in which the State of Utah is primarily concerned and that the State of Utah only is concerned with and will be affected by any judgment rendered herein and that therefore the action is essentially an action against the State of Utah;



3. That the complaint herein does not state a claim upon which any relief can be granted by this court.

Grover A. Giles, Attorney General; Arthur H. Nielsen, Assistant Attorney General; W. L. Skanchy, State Tax Commission Attorney, Attorneys for Defendants.

Received a copy of the above motion this 29th day of September, 1944.

R. J. Hogan, Attorney for Plaintiff.

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[fol. 140] IN UNITED STATES DISTRICT COURT

MINUTE ENTRY—September 29, 1944

On this 29th day of September, 1944, plaintiff appearing by R. J. Hogan, its attorney, and defendant by Arthur H. Nielsen, its attorney, and this case came on for hearing on defendants' motion to dismiss. Defendant attorney consented that ruling on this motion may be the same as in Civil 671, and thereupon the court denied said motion to dismiss. This case consolidated with Civil 671 for purpose of trial, and date of pre-trial set for October 13, 1944, and date of trial set for October 19, 1944.

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IN UNITED STATES DISTRICT COURT

ANSWER—Filed October 11, 1944

Defendants make answer to plaintiff's complaint as follows:

1. For answer to Paragraph 1, defendants deny that there is diversity of citizenship between the parties plaintiff and defendants to this action or that this action arises under the Constitution or laws of the United States as in said Paragraph 1 alleged, or otherwise or at all, or that any such facts exist, as set forth in said paragraph upon which jurisdiction of this court depends.

Defendants admit that the matter in controversy exceeds the sum of \$3,000.00, exclusive of interest and costs.

2. For answer to Paragraph 2, defendants deny that the defendant, State Tax Commission, is a citizen of the State

of Utah or of any state. Defendants admit the other allegations in said Paragraph 2 contained.

3. For answer to Paragraph 3, defendants deny that the controversy herein is wholly between citizens of different states but admit that the matter in controversy is wholly between citizens of different states but admit that the matter in controversy exceeds the sum of \$3,000.00 exclusive of interest and costs.

By way of affirmative defense to the jurisdictional averments in plaintiff's Paragraphs 1, 2, and 3 contained allege that notwithstanding the State Tax Commission and J. Lambert Gibson, Roscoe E. Hammond, Milton Twitchell [fol. 141] and Heber Bennion, Jr., members constituting said State Tax Commission, are named as defendants herein, none of said defendants has any individual interest in the controversy; that the relief sought against these defendants, and each of them, is only in their official capacity as representatives of the State of Utah; that the State of Utah is alone to be affected or compelled to pay any judgment which might be rendered against said defendants, and to the State of Utah alone will inure any benefits to accrue or result from any judgment in favor of defendants herein. Defendants, therefore, allege that this action is one in which the State of Utah, though nominally not a party defendant, is, nevertheless, in truth and in fact, the real defendant and that, therefore, there is no diversity of citizenship herein.

Defendants further alleged that this suit is barred by the provisions of the 11th Amendment to the Constitution of the United States which provides that the judicial power of the United States "shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of Subjects of any Foreign State."

4. Defendants have no information concerning the facts alleged in Paragraph 4 of plaintiff's complaint, and therefore, deny the same.

5. Defendants admit the allegations contained in Paragraph 5 of plaintiff's complaint.

6. Defendants have no information concerning the allegations of paragraph 6 of plaintiff's complaint, and therefore, deny the same.

7. For answer to Paragraph 7, defendants deny that Metals Reserve Company pays and has paid a *subsidy* of 23 $\frac{1}{4}$ ¢ per *llb.* for lead and 23 $\frac{1}{4}$ ¢ per *llb.* for zine and 5¢ per *llb.* for copper production over and above fixed quotas, but allege the facts to be as hereinafter set forth in defendants' affirmative defense.

Defendants admit the other allegations in said paragraph 7 contained.

8. For answer to paragraph 8 of plaintiff's complaint, [fol. 142] defendants deny each and every allegation therein contained.

9. For answer to Paragraph 9, defendants admit that by act of Congress (Revenue Act of 1942, Sections 209, 735, 26 U. S. C. Supp., P. 216), the premium payments here involved were excluded from the provisions of the excess profits tax under the Federal Revenue Act.

Defendants otherwise deny the allegations in said paragraph contained.

10. For answer to paragraph 10, defendants deny the allegations therein contained for want of facts sufficient to form a belief.

11. For answer to paragraph 11, defendants admit that Section 80-5-66, Utah Code Annotated, 1943, provides that:

“ \* \* \* every person engaged in the business of mining or producing ore containing gold, silver, copper lead, iron, zine or other valuable metal in this state shall pay to the state of Utah an occupation tax equal to one per cent of the gross amount received for or the gross value of metalliferous ore sold \* \* \* ”

Defendants further admit that every person in the business of mining is required to make and file with the State Tax Commission each year a statement containing, among other things, the total amount received during the preceding calendar year from the sale of ores and metals. (Section 80-5-67) and that plaintiff filed a statement with the State Tax Commission within the time required by law.

Defendants otherwise deny the allegations contained in said paragraph 11.

12. Defendants deny the allegations contained in paragraph 12.

13. For answer to paragraph 13, defendants admit that plaintiff, on the 25th day of May, 1944, paid to the State Tax Commission the sum of \$13,969.83 and that thereafter, and within the time provided by law, plaintiff filed with the defendant a written petition for the abatement of the balance of the assessment of the occupation tax made by the [fol. 143] State Tax Commission in the amount of \$4,533.54; that said protest was made upon the grounds, as alleged in plaintiff's complaint on file herein, that a hearing thereon was demanded and an extension of time obtained in which to pay said protested portion of tax; that thereafter, on the 29th day of July, 1944, defendants denied plaintiff's petition and protest.

Defendants otherwise deny the allegations contained in said paragraph 13.

14. Defendants deny each and every allegation contained in paragraph 14.

15. For answer to paragraph 15, defendants admit that on the 1st day of August, 1944, plaintiff paid the balance of the assessed tax in the total sum of \$18,503.37 to the defendant, State Tax Commission, and that as to the sum of \$4,533.54, plaintiff made said payment under protest, demanded that said defendant make the record of its office show payment under protest accordingly, which said defendant did and said sum accordingly was not carried into the General Fund of the State but was and is being held and retained as by law provided until it shall have been finally determined whether said tax was lawfully or unlawfully collected.

For further and separate defense, defendants allege as follows:

1. That on February 9, 1942, the Office of Price Administration, pursuant to authority granted by law as in paragraph 5 of plaintiff's complaint set forth, authorized and directed Metals Reserve Company to pay a premium price for ores produced over and above quotas to be fixed jointly by the Offices of Price Administration and the War Production Board, said premium prices to be based on 17 cents for copper, eleven cents for zinc and 9 $\frac{1}{4}$  cents for lead.

2. That Metals Reserve Company on March 7, 1942, issued a statement in which it sets forth that in effecting the

program, as outlined, the said Metals Reserve Company would pay a premium on all domestic production of copper, lead and zinc in excess of monthly quotas established by [fol. 144] the War Production Board and the Office of Price Administration and approved by Metals Reserve Company which will reflect the difference between the respective ceiling prices for the materials involved and the equivalent of 17¢ per pound Connecticut Valley for copper, 9<sup>1</sup>/<sub>4</sub>¢ per pound New York for lead, and 11¢ per pound East St. Louis for zinc; that said statement further provided that "following receipt in each month of its agents' and representative's statements, together with the sworn producers' affidavits, Metals Reserve Company will arrange for the premium payments to be made promptly to the producers". Thereafter, Metals Reserve Company has paid and continues to pay said premium prices for said ores.

3. That as a condition precedent to receiving premium prices from Metals Reserve Company, a producer must file an affidavit to the effect that it has "produced and delivered" to the smelter the amount of copper, lead and zinc as listed; that its monthly production quota has been filled and "the amount of material specified therein has been produced, and delivered for sale during the month above mentioned".

4. That the premium prices paid by Metals Reserve Company are paid on account of the production and delivery to the smelter or refinery of the over-quota ores and in contemplation of the subsequent sale of said ores for use in the further and more expeditious prosecution of the war.

5. That the amounts received by the plaintiff herein from Metals Reserve Company on account of the production and delivery to the smelter of all ores sold in the calendar year, 1943, are part of the "gross amount received for or the gross value of metalliferous ore sold" as set forth in Section 80-5-66, Utah Code Annotated, 1943.

6. That at the time plaintiff herein filed with defendant, State Tax Commission, the statement required by Section 80-5-67, Utah Code Annotated, 1943, plaintiff failed to include therein the amount of the premium prices received from Metals Reserve Company on account of the ores sold during the calendar year 1943; that thereafter and pursuant

to Subdivision 5 of said Section 80-5-67, the said defendant, [fol. 145] State Tax Commission, requested plaintiff to file such information, which plaintiff failed to do but in lieu thereof, and because it was considered to be approximately the same sum, plaintiff filed with the State Tax Commission a statement setting forth the amount of premiums paid to it by Metals Reserve Company for ores produced and delivered to the smelter during the year 1943; that thereupon and pursuant to authority granted by Section 80-5-68, Utah Code Annotated, 1943, the defendant, State Tax Commission, accepted said amount in the sum of \$453,353.54 as being the amount received by said plaintiff from Metals Reserve Company in connection with the ores sold by plaintiff during the year 1943; that subsequently and pursuant to Section 80-5-66, the defendant, State Tax Commission, lawfully levied and assessed an occupation tax in the sum of \$18,503.37 against the plaintiff herein:

Wherefore, defendants pray judgment that the plaintiff take nothing by reason of its complaint on file herein but that the same be dismissed with costs.

Grover A. Giles, Attorney General; Arthur H. Nielsen, Assistant Attorney General; W. L. Skanechy, Attorney for State Tax Commission, Attorney for Defendants.

(Duly verified.)

Received copy of the foregoing answer this 10th day of October, 1944.

R. J. Hogan, Attorney for Plaintiff.

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[Note Reporter's transcript of Proceedings on Pre-Trial of October 13, 1944, appears at side folio 24.]

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[fol. 146] IN UNITED STATES DISTRICT COURT

AMENDED AFFIRMATIVE DEFENSE—Filed October 18, 1944

Come now the defendants above named and by leave of the court hereby substitute the attached pages numbered



5 to 10 in lieu of defendants' affirmative defense contained on Pages 4, 5, and 6 of defendants' original answer.

Grover A. Giles, Attorney General; Arthur H. Nielsen, Assistant Attorney General; W. L. Skanechy, Attorney for State Tax Commission, Attorneys for Defendants.

Received a copy of the foregoing amended affirmative defense this 17th day of October, 1944.

R. J. Hogan per E. Lynch, Attorney for Plaintiff.

For further and separate defense, defendants allege as follows:

1. Section 902e of the Emergency Price Control Act of 1942 which became law on January 30, 1942 (Ch. 26, 56 Stat. 23; 50 U. S. C. App., Sec. 901 et seq.) provides that the administrator whenever he determines that the maximum necessary production is not being obtained or may not be obtained during the ensuing year may, on behalf of the United States, "buy or sell at public or private sale or store or use, such commodities in such quantities and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof or otherwise to supply the demand therefor, or make subsidy payments to domestic producers of such commodity in such amounts and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof; Provided, That in the case of any commodity which has heretofore or may hereafter be defined as a strategic or critical material by the President pursuant to section 5d of the Reconstruction Finance Corporation Act, as amended (Title 15 Sees. 606b, 609j) such determinations shall be made by [fol. 147] the Federal Loan Administrator, with the approval of the President, and notwithstanding any other provision of this Act or of any existing law, such commodity may be bought or sold, or stored or used, and such subsidy payments to domestic producers thereof may be paid, only by corporations created or organized pursuant to such section 5d (Title 15, Sees. 606b, 609j); except that in the case of the sale of any commodity by any such corporation, the sale price therefor shall not exceed any maximum price established pursuant to subsection (a) of this section which

is applicable to such commodity at the time of sale or delivery..

2. Pursuant to authority granted by Secs. 901 and 902 of said Emergency Price Control Act of 1942, the administrator, on April 28, 1942 (7 F. R. 3153 as amended) issued his general maximum price regulation whereby it was provided that no person shall sell or deliver any commodity at a price higher than the maximum price permitted by the regulation (Section 1499.1). Said regulation further provided that the provisions thereof should not apply to such sales and deliveries of commodities as might be specified by supplementary regulations or amendments thereto (Sec. 1499.9). Said general maximum price regulation became effective.

Thereafter, to-wit, on August 12, 1941, and in furtherance of the objects of said Emergency Price Control Act of 1942, the administrator issued his price schedule No. 15 whereby it was provided that on and after February 1, 1942, no person should sell, offer to sell, deliver or transfer copper and no person should buy, offer to buy or accept delivery of copper at a price higher than twelve cents per pound Connecticut Valley provided "that any person may sell or offer to sell, deliver, or transfer copper to Metals Reserve Company or any other government department, agency, or corporation previously approved in writing by the Office of Price Administration, and Metals Reserve Company, or any other government department, agency or corporation so approved by the Office of Price Administration may buy, offer to buy, or accept delivery of copper at prices higher than the maximum prices set forth".

[fol. 148] On January 13, 1942, the administrator issued Price Schedule No. 69 setting forth restrictions as to the sale or delivery of "primary lead" similar to those contained above with respect to copper, provided, however, that the ceiling price for "primary lead" should be 6 $\frac{1}{2}$ ¢ per pound. On January 28, 1942, the administrator issued Price Schedule No. 81 setting forth restrictions as to the sale or delivery of "primary slab zinc" similar to those contained above with respect to copper, provided, however, that the ceiling price for "primary slab zinc" should be 8 $\frac{1}{4}$ ¢ per pound.

Subsequently, the administrator of the Office of Price Administration amended the provisions of the General

Maximum Price Regulation and particularly Section 14909 whereby it was provided that the general maximum price regulation should not apply to "sales or deliveries of metallic copper, lead or zinc to the Metals Reserve Company, or its duly authorized *agents*, or agents, pursuant to the premium price plan announced by the Federal Loan Agency, the War Production Board, and the Office of Price Administration. This amendment became effective May 18, 1942. (7 F. R. 3724).

3. Pursuant to Title 15, U. S. C., Sec. 606b (being the same as Section 5d of the Reconstruction Finance Corporation Act, as amended, 15 U. S. C., Section 606b, 609j) Metals Reserve Company was incorporated on June 28, 1940. (6 F. R., 2970). The articles of incorporation thereof, as amended, set forth the objects, purposes and powers of the corporation to be "to produce, acquire, carry, sell, or otherwise deal in strategic and critical materials as defined by the President". (filed Oct. 3, 1941, 6 F. R. 5464).

4. On January 12, 1942, the Honorable Jesse Jones, as Federal Administrator, pursuant to authority granted under Sec. 5d of the Reconstruction Finance Corporation Act, as amended, announced that Metals Reserve Company would pay a higher price for lead, zinc and copper according to a plan to be announced. The statement further provided that any metals "so required by the Metals Reserve Company which are not used for or by the government will [fol. 149] be subject to your allocation at the ceiling price fixed by the price administrator".

5. On February 9, 1942, a joint statement was issued by the War Production Board and the Office of Price Administration setting forth certain rules and regulations governing the payment of premium prices for over-quota production of copper, lead and zinc. Said statement provides that in accordance with the plan announced, "Metals Reserve Company has announced that it will pay, for a period of two and one-half years beginning February 1, 1942, and ending July 31, 1944, premium prices for the production of copper, lead and zinc in excess of quotas to be established jointly by the War Production Board and the Office of Price Administration. These premium prices will be based on 17¢ for copper, 11¢ for zinc and 9¼¢ for lead".

6. On March 7, 1942, Metals Reserve Company issued its statement which, as subsequently amended, states that in effecting the program as outlined, the said Metals Reserve Company would pay a premium on all domestic production of copper lead and zinc in excess of monthly quotas established by the War Production Board and the Office of Price Administration and approved by Metals Reserve Company which will reflect the difference between respective ceiling prices for the materials involved and the equivalent of 17c per pound Connecticut Valley for copper, 9 1/4c per pound New York for lead, and 11c per pound East St. Louis for zinc. Each producer representing himself as eligible for premium payment must "(1) cause the smelting company to which he ships to be furnished, as agent for Metals Reserve Company, with a sworn producer's affidavit (forms thereof can be obtained by the producer from the smelting company) showing, among other things, the amount of material in excess of quota delivered during the month covered by such affidavit for which he has been paid or will be paid and on which he is eligible for a premium, and (2) cause the smelting company to be furnished with all necessary information so as to enable it to supply Metals Reserve Company with a statement setting out all the data required for the making of the premium payments". Said statement further provides that "following receipt in each [fol. 150] month of its agents' and representative's statements, together with sworn producers' affidavits, Metals Reserve Company will arrange for the premium payments to be made promptly to the producers". Thereafter, Metals Reserve Company has paid and continues to pay said premium prices for said ores as in said program set forth.

7. The affidavit of the producer requires the producer to certify that it has "produced and delivered" to the smelting company during the particular month the quantities of copper, lead and zinc as listed; that its monthly production quota has been filled and the amount of materials specified therein "has been produced and delivered for sale during the month above mentioned, in addition to the amount of materials in excess of quota produced and delivered as hereinafter listed".

The premium prices paid by Metals Reserve Company to the plaintiff herein are paid on account of the production

and delivery to the smelter as hereinabove set forth of the ores produced in excess of quota. Thereafter, the allocation of said ores is made in accordance with priority ratings as established by the President of the United States pursuant to powers granted by statute (56 Stat. 177, 50 U. S. C. App. Sec. 633).

8. The amounts received by the plaintiff herein from Metals Reserve Company on account of the production and delivery to the smelter pursuant to the program above outlined of all ores sold in the calendar year 1943, are part of the "gross amount received for or the gross value of metaliferous ore sold" as set forth in Section 80-5-66, Utah Code Annotated, 1943.

9. At the time plaintiff herein filed with defendant, State Tax Commission, the statement required by Section 80-5-67, Utah Code Annotated, 1943, plaintiff failed to include therein the amount of the premium prices received from Metals Reserve Company on account of the ores sold during the calendar year 1943. Thereafter and pursuant to Subdivision 5 of said Section 80-5-67, the said defendant, State Tax Commission, requested plaintiff to file such information. Plaintiff thereupon filed with the State Tax Commission a statement setting forth the amount of [fol. 151] premiums paid to it by Metals Reserve Company for ores produced and delivered to the smelter during the year 1943, in the sum of \$453,353.54. The defendant, State Tax Commission, thereafter lawfully levied and assessed an occupation tax in the sum of \$18,503.37 against the plaintiff herein.

Wherefore, defendants pray judgment that the plaintiff take nothing by reason of its complaint on file herein but that the same be dismissed with costs.

Grover A. Giles, Attorney General; Arthur H. Nielsen, Assistant Attorney General; W. L. Skanchy, Attorney for State Tax Commission, Attorneys for Defendants.

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[Note: Pre-Trial Order October 13, 1944 appears at side folio 27.]

[Note: Minute Entry—October 27, 1944 appears at side folio 28.]

## IN UNITED STATES DISTRICT COURT

JUDGMENT—Entered October 30, 1944

This action having come on regularly for trial beginning October 27, 1944, with plaintiff appearing by R. J. Hogan, its attorney, and defendants by A. H. Nielsen and W. L. Skanechy, its attorneys, and this case was consolidated for purpose of trial with Civil 671, Kennecott Copper Corporation v. State Tax Commission, et al., and a jury of twelve good and lawful persons was duly empaneled and sworn to well and truly try this case and a true verdict render according to the evidence. The jury was excused from the box, and the case was submitted on stipulation. Each side moved for a directed verdict in its favor, and the court heard the arguments of counsel on said motions, and on October 30th, the jurors resumed their places in the jury box and were instructed by the court to return the following verdict in this case:

[fol. 152] "We, the jury, duly empaneled and sworn in the above-entitled cause find the issues joined in favor of the plaintiff, and against the defendants, in the sum of \$4,533.54 with interest from July 29, 1944, at 6% per annum, by direction of the court. Dated: October 30, 1944. Frank Fountain, Foreman."

Wherefore, it is ordered and adjudged by the court on this 30th day of October, 1944, that Silver King Coalition Mines Company, a corporation recover of and from defendant, State Tax Commission, et al., the sum of \$4,533.54 with interest from July 29, 1944, at 6% per annum, together with its costs herein incurred to be taxed upon a verified cost bill and have execution therefore.

Attest: W. B. Wilson, Clerk.

## IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed January 26, 1945

To the above named plaintiff, Silver King Coalition Mines Company, a corporation, and to R. J. Hogan its Attorney:

Notice is hereby given that the defendants above named hereby appeal to the United States Circuit Court of Appeals



for the Tenth Circuit from the judgment entered by the above-entitled court on the 30th day of October, 1944, in accordance with a directed verdict of the jury, in favor of the plaintiff and against the defendants in the sum of \$4,533.54 with interest from July 29th, 1944, at 6% per annum.

Dated this 26th day of January, 1945.

Grover A. Giles, Attorney General; Arthur H. Nielsen, Assistant Attorney General; W. L. Skanchy, Attorney for State Tax Commission, Attorneys for Defendants.

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[fol. 153] IN UNITED STATES DISTRICT COURT

STIPULATION DISPENSING WITH BOND—Filed January 25, 1945

It is hereby stipulated by and between the parties hereto through their respective attorneys of record that the bond on appeal, or any other bond herein required of the defendants in connection with their appeal to the United States Circuit Court of Appeals for the Tenth Circuit may be dispensed with and the defendants, and each of them, are hereby relieved from the necessity of filing any such bond.

Dated this 26th day of January, 1945.

Grover A. Giles, Attorney General; Arthur H. Nielsen, Assistant Attorney General; W. L. Skanchy, Attorney for State Tax Commission, Attorneys for Defendants. R. J. Hogan, Attorney for Plaintiff.

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IN UNITED STATES DISTRICT COURT

STIPULATION DESIGNATING RECORD ON APPEAL—Filed January 26, 1945

It is hereby stipulated by and between the parties hereto through their respective attorneys of record that for inclusion in the transcript of the record on defendants' appeal herein, the clerk of this court shall transmit under his hand and the seal of the court to the United States Circuit Court of Appeals for the Tenth Circuit the following documents

which will then constitute and present the complete record and all of the proceedings and evidence in this action:

1. Complaint.
2. Stipulation consolidating the above case with case No. 671 for purpose of trial.
3. Motion of defendants to dismiss.
4. Minute entry of September 29th denying defendants' motion to dismiss.
- [fol. 154] 5. Answer of defendants.
6. Reporter's transcript of proceedings on pre-trial held October 13, 1944.
7. Amendment to defendants' answer, pursuant to permission granted in open court.
8. Order on pre-trial dated October 21, 1944.
9. Minute entry of October 27th, 1944.
10. Plaintiff's exhibits 1 and 2 constituting the stipulation of facts and the pertinent statutes and orders and announcements of the various federal agencies, or reporter's transcript thereof.
11. Judgment of the court in accordance with the directed verdict of the jury in favor of the plaintiff and against the defendants, dated October 30, 1944.<sup>10</sup>
12. Reporter's transcript of oral decision rendered October 30, 1944.
13. Notice of appeal with date of filing.
14. Stipulation dispensing with bond.
15. Designation of and stipulation as to the record.
16. Statement of points relied on.
17. Clerk's certificate.

Dated this 26th day of January, 1945.

Grover A. Giles, Attorney General; Arthur H. Nielsen, Assistant Attorney General; W. L. Skanchy, Attorney for State Tax Commission, Attorneys for Defendants. R. J. Hogan, Attorney for Plaintiff.

[fol. 155] IN UNITED STATES DISTRICT COURT

STATEMENT OF POINTS UPON WHICH APPELLANTS INTEND  
RELY—Filed February 21, 1945

To the above-named plaintiff, Silver King Coalition Mining  
Company, a corporation, and to R. J. Hogan, its attorney

You are hereby notified that the defendants and each of  
them intend to rely upon the following points in connection  
with their appeal from the judgment entered by the  
above-entitled court on the 30th day of October, 1944:

(1) Error of the court in refusing to grant defendants'  
motion to dismiss the action, upon the grounds as stated in  
said motion.

(2) Error of the court in denying defendants' motion for  
a directed verdict in said cause on the evidence and facts  
presented to the court by the parties.

(3) Error of the court in granting plaintiff's motion for  
a directed verdict on the evidence and facts presented to  
the court by the parties.

Grover A. Giles, Attorney General; Arthur H. Nielsen,  
Assistant Attorney General; W. L. Skanehele, Attorney  
for State Tax Commission; Attorney for Defendants.

Received a copy of the foregoing this 21 day of February  
1945.

R. J. Hogan, per E. Lynch, Attorney for Plaintiff

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[Note. Reporter's transcript containing proceedings of  
October 27, 1944, court's oral decision transcribed, Exhibit  
1, the stipulation of facts and Exhibit 2, consisting of various  
executive orders, etc. is identical with reporter's transcript  
in case No. 3131, State Tax Commission et al., vs  
Kennecott Copper Corporation appearing at side folios 3  
to 127].

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[fols. 156-158]; [Clerk's Certificates to foregoing transcript  
omitted in printing.]

[fol. 159] IN THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE TENTH CIRCUIT

ORDER OF SUBMISSION

Fourth Day, May Term, Thursday, May 17th, A. D. 1945.  
Before Honorable Orie L. Phillips, Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Judges.

These causes came on to be heard and were argued by counsel, Arthur H. Nielsen, Esquire, appearing for appellants, C. C. Parson, Esquire, appearing for appellees.

Thereupon these causes were submitted to the court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

Arthur H. Nielsen, Assistant Attorney General, (Grover A. Giles, Attorney General, and W. L. Skanechy, State Tax Commission Attorney, were with him on the brief) for Appellants.

C. C. Parsons (Wm. M. McCrea and A. D. Moffat for Kennecott Copper Corporation, and R. J. Hogan, for Silver King Coalition Mines Company, were with him on the brief) for Appellees.

Before Phillips, Bratton and Huxman, Circuit Judges

OPINION—July 23, 1945

HUXMAN, Circuit Judge, delivered the opinion of the court.

These were two separate actions, one instituted by Kennecott Copper Corporation and the other by Silver King Coalition Mines Company, against the State Tax Commission of Utah and the individuals constituting the Commission. The actions were brought in the United States District Court for the District of Utah to recover alleged illegal taxes paid under protest. Both plaintiffs prevailed and the Commission has appealed. While separate appeals were perfected, the cases present identical questions. They were briefed and argued together and will be so treated in this opinion. On account of the conclusion we have

reached on the jurisdictional question, it will not be necessary to discuss or consider in detail the nature or character of the taxes in question.

Appellant urges that these suits were actions against the State of Utah and that Utah has not waived its immunity from suit in the federal courts under the Eleventh Amendment to the United States Constitution.

We think the position that these actions are suits against the State is well taken. The suits were filed against the State Tax Commission and against the members of the Tax Commission as individuals. Whether a suit is one against a state is not to be determined alone from the mold in which the pleadings are cast. The names of the titular parties do not determine the question. If the impact of the judgment is felt by the state, then it is in fact the real party in interest. It has been held that a suit against an officer of a state for a money judgment which the state was required to satisfy was a suit against the state. See *Ex parte New York*, 256 U. S. 490, 500.

Utah has comprehensive statutes dealing with the assessment and collection of taxes and with the right of tax payers to challenge the collection of taxes claimed to be illegal for any reason.<sup>1</sup> These statutes provide for the assessment of mines by the State Tax Commission, and require the Commission to keep records of assessments of mines. They provide for notice of assessments, opportunity for hearings before the Commission and correction of assessments, and for application to the Supreme Court by writ of certiorari for review of the decisions of the Commission. Section 80-5-76 provides that no court other than the Supreme Court shall have jurisdiction to review, alter or annul a decision of the Commission. Section 80-11-13 provides that any tax paid under protest shall not be covered into the general fund but shall be held and retained by the State Treasurer until the time for filing an action for its recovery shall have expired, and if such an action is filed, until it has been finally determined, and that if the tax is determined to be illegal, the officer collecting the tax shall approve a claim for the same and the [fol. 161] State Treasurer shall then repay the same, together with costs and interest, from any unappropriated

<sup>1</sup> See Title 80, Revenue & Taxation, Utah Code Ann., 1943.

funds in the hands of the Treasurer, or in case it is necessary, a deficit shall be authorized.

From the above general view of the Utah Statutes, it is clearly apparent that Utah is the real defendant in these suits. The funds are in its possession as escrow holder. If the judgments which the appellees recovered stand, the State Treasurer, who had nothing to do with the collection of the taxes, is by law required to repay them from funds which he holds for that purpose. Appellees recognized that these were proceedings against the State to recover funds held by it in escrow, and not suits against the individual members of the Tax Commission to recover a personal judgment on account of their wrongful acts when they filed their petitions. Their petitions alleged that they paid the tax under protest and demanded that the Commission make the records required in such cases, and that the money had not been covered into the general fund of the state but was being retained as by law required until it was finally determined whether the tax had been unlawfully collected. If these were suits against the individual members of the Commission for a personal judgment, these allegations would be surplusage and immaterial to the issue.

Utah has waived its immunity from suit and has consented to be sued in actions for the recovery of taxes, which it is claimed have been illegally exacted. But has it also consented to be sued in the federal court?

The pertinent part of Section 80-5-76 Utah Code, Annotated, 1943, from which this question must be answered, provides that: "Any taxpayer may pay his occupation tax under protest and thereafter bring an action in any court of competent jurisdiction for the return thereof as provided by Section 80-11-11." It is argued that the phrase "any court of competent jurisdiction" has generally been construed to include federal courts where jurisdictional facts are present, and that there is nothing in the context of the statute to indicate that Utah did not intend to embrace a federal court in its waiver of immunity from suit. The question here is in what sense did Utah use this phrase [fol. 162] when it waived its immunity from suit? It had two immunities—it was absolutely immune from suit, and in addition thereto was also immune from suit in federal courts. Waiving its immunity from suit for the recovery of illegal taxes did not confer jurisdiction on federal courts



to entertain such actions unless the State in addition expressly consented that such a suit might be brought in the federal courts. *Blackburn v. Portland Gold Mining Co.*, 175 U. S. 571, and kindred cases, upon which appellees rely, are not in point on this question. In the *Blackburn* case the Supreme Court considered a federal statute which required one claiming an adverse interest in a mining claim to institute an action within a specified time to establish the same in any court of competent jurisdiction. The action in that case was filed in the state court, and it was contended that such court was without jurisdiction. The Supreme Court merely held that what the statute did was to require a claimant to bring an action and that it evidenced no Congressional intent to restrict the right which the litigant had sans the statute to choose the forum in which he would bring the action. Without the statute an action to quiet title could have been instituted in the state court or in the federal court if jurisdictional requirements were present. The Supreme Court merely said that Congress did not by the passage of this Act intend to bar any of the doors through which a litigant might go in bringing such an action.

In our opinion it is not sufficient to say that there is nothing in the context of the statute to indicate that Utah did not intend to embrace the federal court in its waiver of immunity from suit. Before it can be sued in such courts, the statute must use language which evidences a clear intent to submit to the jurisdiction of federal courts. We think the rule which must guide us in interpreting this language is laid down in *Great Western Ins. Co. v. Read*, 322 U. S. 47, where the Supreme Court said:

"When a state authorizes a suit against itself to do justice to taxpayers who deem themselves injured by any exaction, it is not consonant with our dual system for the federal courts to be astute to read the consent to embrace federal as well as state courts [fol. 163] \* \* \* when we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found."

This language was repeated in substance in *Ford Motor Company v. Department of Treasury*, 323 U. S. 459. Both of these cases construed statutes very similar to the Utah statute and in both instances the Supreme Court held that the waiver of those statutes from immunity to suit did not constitute a waiver of the additional immunity from such suit in federal court. The statutes, while not identical with the Utah statute, are very similar, and we think the decisions in these two cases control the question here.

The statute of Indiana which was considered by the Supreme Court in the *Ford Motor Company* case, authorized "action or suit against the department in any court of competent jurisdiction, and the circuit or superior court of the county in which the taxpayer resides or is located, shall have original jurisdiction . . . ." Significance is claimed for the language which refers to the Circuit Court or Superior Court of the county in which the taxpayer resides. No comparable language is found in the Utah statute. But the Oklahoma statute, like the Utah statute, contains no language similar to that in the Indiana statute. The Oklahoma statute provides for suit "in the court having jurisdiction thereof."

In considering whether Utah intended to consent to suit only in the state court or whether it intended to waive its further immunity from suit in the federal court, it is not sufficient to merely consider the provision of Section 80-5-76 which authorizes suit in "any court of competent jurisdiction." We must look to the entire plan of tax levy and collection. When so viewed, we think it is clear that Utah contemplates that proceedings for the levy, collection and resistance of taxes which it is claimed are illegally levied, shall be carried on within the framework of the state's government, including its courts. As pointed out, Utah has a comprehensive statute providing for the levy and collection of taxes, including the right of a taxpayer to challenge the [fol. 164] tax. The occupation taxes in question here are levied by the State Tax Commission. There are provisions in the statute for notice of assessment, opportunity for protest, and hearings before the Commission, and for appeal to the Supreme Court of the state. Section 80-5-76 which gives the right to sue in any court of competent jurisdiction for the recovery of this particular tax provides that no court in the state except the Supreme Court has jurisdiction to

review, alter or annul any decision of the Tax Commission or to suspend or delay the operation thereof. Without analyzing these statutes in minute detail, it is our conclusion that they contemplate a tax process and proceeding within the state framework and that the right of suit given by Section 80-5-76 was limited to suit in the state court.

In any event, there is in our opinion no such clear declaration in the statute of the intention of Utah to submit to suit in the federal courts as would in the absence of a decision to that effect by the Supreme Court of Utah justify us in giving the statute such a broad interpretation.

It is urged that the statutes of Utah manifest a state policy of permitting claims against the state to be prosecuted in federal courts. We think an analysis of these statutes leads to a contrary conclusion. Section 80-11-11 which confers the right upon any taxpayer to sue for the recovery of illegal taxes was enacted in 1896 in substantially its present form. Prior to 1933 it did not include the right to sue the state. In 1933 it was amended by adding the words "state . . . or other taxing unit." At all times it used the phrase "in any court of competent jurisdiction." The section in question, 80-5-76, was passed in 1937. Again the Legislature used the phrase "in any court of competent jurisdiction." But in 1939, when a statute was passed consenting that suits in certain classes of cases might be brought against the state, the language employed was that suit might be filed "in any court of this state or of the United States."<sup>2</sup> It would seem reasonable to assume that if by the use of the language in question throughout the years, including the Act of 1937, the state had meant and intended to confer jurisdiction upon federal courts to [fol. 165] entertain such suits, it would have again employed the same language in the Act of 1939. But in that statute the state expressly named the federal courts.

Finally, it is contended that Utah by administrative interpretation and conduct has firmly established the right of litigants to use the federal courts in actions against the state for the recovery of taxes. A number of cases are cited to sustain this contention. All of them are cases in which the county rather than the state was the party litigant. No case in which the state was a party to a suit in federal court

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<sup>2</sup> Utah Code Ann., 1943, Sec. 104-3-27.

without its consent is cited, nor has any been found. Counties or subdivisions lesser than the state are not immune from suit in the federal court under the Eleventh Amendment. *Lincoln County v. Luning*, 133 U. S. 529.

The judgments are severally REVERSED, and the causes are REMANDED, with directions to dismiss the actions without prejudice to the filing of an action in proper courts of the State.

#### DISSENTING OPINION

PHILLIPS, Circuit Judge, dissenting:

Section 80-5-66, Utah Code Ann. 1943, imposes an occupation tax on every person engaged in the business of mining or producing valuable metalliferous ore "equal to one per cent of the gross amount received for or the gross value of metalliferous ore sold." Section 80-5-81, Utah Code Ann. 1943, provides that all such taxes shall be paid to the State Tax Commission and by it paid over to the state treasurer. Section 80-5-76, Utah Code Ann. 1943, provides that "any taxpayer may pay his occupation tax under protest and thereafter bring an action in any court of competent jurisdiction for the return thereof as provided by § 80-11-11, Revised Statutes of Utah, 1933." Section 80-11-11, supra, provides that where a party, whose property is taxed, or from whom a tax is demanded or enforced, deems such tax unlawful, he may pay the same under protest to the officers designated and authorized by law to collect the same, and thereupon "may bring an action in any court of competent jurisdiction against the officer to whom said tax . . . was paid, or against the state, county, municipality or other [fol. 166] taxing unit on whose behalf the same was collected, to recover said tax."

Section 80-11-13, Utah Code Ann. 1943, provides that where a tax is paid to the state under protest, it "shall not be covered into the general fund but shall be held and retained by the state treasurer . . . until the time for the filing of an action for the recovery" of such tax, "and in case an action has been filed, until it shall have been finally determined that" such "tax . . . was lawfully or unlawfully collected"; that in case it shall be determined that such tax was unlawfully collected, the officer collecting

<sup>1</sup> §80-11-11, Utah Code Ann. 1943.

the same shall forthwith approve a claim for the amount of the tax adjudged to have been unlawfully collected, together with costs and interest, and that any amount in excess of the tax required to pay such claim, including interest and costs, shall be repaid out of any unappropriated funds in the hands of the state treasurer.

The word "any" is equivalent to, and has the force of, every or each one of all.<sup>2</sup> It is all-comprehensive and, unless limited by the context, includes all persons and things referred to indiscriminately.<sup>3</sup>

Where not limited by the context, the phrase "any court of competent jurisdiction" includes a federal court, as well as a state court, where facts requisite to federal jurisdiction are present.<sup>4</sup>

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<sup>2</sup> *Hopkins v. Sanders*, 172 Mich. 227, 137 N. W. 709, 713; *Roedler v. Vandalia Bus Lines, Inc.*, 281 Ill. App. 520, 523; *Heyler v. City of Watertown*, 16 S. D. 25, 91 N. W. 334; *People v. Van Cleave*, 187 Ill. 125, 58 N. E. 422, 425; *Bouvier's Law Dictionary, Unabridged, Rawle's 3d Rev., Vol. 1, p. 205.*

<sup>3</sup> *Orme v. Atlas Gas & Oil Co., — Minn. —, 13 N. W. 2d 757, 763.*

See, also, *Stout v. Simpson*, 34 Okla. 129, 124 P. 754, 756.

<sup>4</sup> See *Blackburn v. Portland Gold Mining Co.*, 175 U. S. 571; *Shoshone Mining Co. v. Rutter*, 177 U. S. 505, 506; and *Chambers v. Harrington*, 111 U. S. 350, construing the phrase "a court of competent jurisdiction" embraced in § 2326, Rev. Stat., 30 U. S. C. A. § 30, providing for what is known in the mining regions as an "adverse suit";

*Regan v. Kroger Grocery & Baking Co.*, 386 Ill. 284, 54 N. E. 2d 210; and *Miller v. Municipal Court of City of Los Angeles*, 22 Cal. 2d 818, 142 P. 2d 297, 308, construing the phrase "in any court of competent jurisdiction" in § 205(e) of the Emergency Price Control Act of 1942, 50 U. S. C. A. App. § 901;

*Stringer v. Griffin Grocery Co., Tex. Civ. App.*, 149 S. W. 2d 158, 160; *Booth v. Montgomery Ward & Co., Inc.*, D. C. Neb. 44 F. Supp. 451; *Donahue v. Susquehanna Collieries Co.*, 3 Cir., 138 F. 2d 3; *Hargrave v. Mid-Continent Petroleum Corp.*, D. C. Okl., 36 F. Supp. 233; and *Wingate v. General Auto Parts Co.*, D. C. Mo., 40 F. Supp. 364, construing the phrase "any court of competent jurisdiction" in § 16 of the Fair Labor Standards Act of 1938, 29 U. S.

[fol. 167] In *Shoshone Mining Co. v. Rutter*, 177 U. S. 505, 506, the court said:

"When in section 2326, Rev. Stat., Congress authorized that which is familiarly known in the mining regions as an 'adverse suit,' it simply declared that the adverse claimant should commence proceedings 'in a court of competent jurisdiction.' It did not in express language prescribe either a Federal or a state court, and did not provide for exclusive or concurrent jurisdiction. If it had intended that the jurisdiction should be vested only in the Federal courts, it would undoubtedly have said so. If it had intended that any new rule of demarcation between the jurisdiction of the Federal and state courts should apply, it would likewise undoubtedly have said so."

There is nothing in the Utah statutes indicating an intention on the part of the legislature that the phrase "any court of competent jurisdiction" should not embrace federal courts. In that respect, the instant case is distinguishable from *Great Northern Ins. Co. v. Read*, 322 U. S. 47. The *Read* case was a suit to recover taxes paid under protest brought under 68 O. S. 1941, § 15.50. The statute in that case provides that "All such suits shall be brought in the Court having jurisdiction thereof, and they shall have precedence therein," and directs the form of judgment that shall be entered. Clearly, the Oklahoma legislature could not direct a federal court to give precedence to suits brought therein for the recovery of taxes. Nor could it direct the manner and method of entering judgment in a federal court. In the *Read* case, the Supreme Court said:

[fol. 168] "Furthermore, § 12665 gives directions to the Oklahoma officer as to his obligations, requires the

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C. A. § 216(b), which provides for suits by employees to recover liability of employer for violating §§ 6 and 7 of such Act;

In re *Chicago & E. I. Ry. Co.*, 7 Cir., 121 F. 2d 785, construing § 77, sub. j, of the Bankruptcy Act, 11 U. S. C. A. § 205, sub. j, which provides that suits or claims for damages caused by the operation of trains, busses, or other means of transportation may be filed and prosecuted to judgment in any court of competent jurisdiction.



court to give precedence to these cases and directs the kind of judgment to be returned, see note 1, supra, which is quite different in language, if not in effect, from the judgment a federal court would render. It is clear to us that the legislature of Oklahoma was consenting to suit in its own courts only."

Moreover, it is the public policy of Utah to permit suits against the state, to which the state has consented, to be brought both in the state and federal courts. Section 104-3-27, Utah Code Ann. 1943, originally enacted in 1939, in part provides:

"\* \* \* the consent of the state of Utah is given to be named a party in any suit which is now pending or which may hereafter be brought in any court of this state or of the United States for the recovery of any property real or personal or for the possession thereof or to quiet title thereto, or to foreclose mortgages or other liens thereon or to determine any adverse claim thereon, or secure an adjudication touching any mortgage or other lien the state of Utah may have or claim on the property involved. \* \* \*"

In this respect, the instant case is distinguishable from *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U. S. 459. That, too, was a case to recover taxes paid under protest under § 64-2614(a) of Burns, Indiana Stat. Ann. 1943 Replacement. That section, in part, provides:

"\* \* \* Any person improperly charged with any tax provided for under the terms of this act, and required to pay the same, may recover any amount thus improperly collected, together with interest, in any proper action or suit against the department in any court of competent jurisdiction; and the circuit or superior court of the county in which the taxpayer resides or is located shall have original jurisdiction of action to recover any amount improperly collected: \* \* \*"

Section 4-1501, Burns, Indiana Stat. Ann. 1933, provides ○[fol. 169] that any person or persons having a claim against the state, arising, at law or in equity, out of a contract, express or implied, may bring suit therefor against the state

in the superior court of Marion County, Indiana, and that jurisdiction is vested upon such court to hear and determine such action. Indiana thereby manifests a state policy to permit claims against the state to be prosecuted only in her own courts.

Furthermore, the Supreme Court of the United States stated that the provision in the Indiana statute which vests original jurisdiction in the "circuit or superior court of the county in which the taxpayer resides or is located" indicates that the state legislature contemplated suit in the state courts.

In the instant case, neither the context of the statute nor the public policy of the state of Utah indicates that the phrase "in any court of competent jurisdiction" should be restricted to state courts.

For the reasons indicated, I respectfully dissent.

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#### IN UNITED STATES CIRCUIT COURT OF APPEALS

#### JUDGMENT, No. 3131

Fortieth Day, May Term, Monday, July 23rd, A. D. 1945.  
Before Honorable Orie L. Phillips, Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Utah and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed; that this cause be and the same is hereby remanded to the said district court with directions to dismiss the action without prejudice to the filing of an action in the proper court of the State; and that State Tax Commission and J. Lambert Gibson, Roscoe E. Hammond, Milton Twitchell, and Heber Bennion, Jr., constituting said State Tax Commission, appellants, have and recover of and from Kennecott Copper Corporation, a corporation, appellee, their costs herein.

[fols. 170-171] IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT, No. 3132

Fortieth Day, May Term, Monday, July 23rd, A. D. 1945.  
Before Honorable Orie L. Phillips, Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Utah and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed; that this cause be and the same is hereby remanded to the said district court with directions to dismiss the action without prejudice to the filing of an action in the proper court of the State; and that State Tax Commission and J. Lambert Gibson, Roscoe E. Hammond, Milton Twitchell, and Heber Bennion, Jr., constituting said State Tax Commission appellants, have and recover of and from Silver King Coalition Mines Company, a corporation, appellee, their costs herein.

Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 172] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1945

No. 424

ORDER ALLOWING CERTIORARI—Filed November 5, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

The Chief Justice and Mr. Justice Jackson took no part in the consideration or decision of this application.

[fol. 173] SUPREME COURT OF THE UNITED STATES, OCTOBER  
TERM, 1945

No. 425

ORDER ALLOWING CERTIORARI—Filed November 5, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

The Chief Justice and Mr. Justice Jackson took no part in the consideration or decision of this application.

Endorsed on cover: Enter C. C. Parsons.. File No. 50127, 50128. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 424. Kennecott Copper Corporation, Petitioner, vs. State Tax Commission; and J. Lambert Gibson, Roscoe E. Hammond, Milton Twitchell, and Heber Bennion, Jr., Constituting said State Tax Commission. Term No. 425. Silver King Coalition Mines Company, Petitioner, vs. State Tax Commission; and J. Lambert Gibson, Roscoe E. Hammond, Milton Twitchell, and Heber Bennion, Jr., Constituting said State Tax Commission. Petition for writs of certiorari and exhibit thereto. Filed September 12, 1945. Term No. 424, O. T. 1945; 425, O. T. 1945.

(1657)

FILE COPY

Office - Supreme Court, U. S.

FILED

SEP 12 1945

CHARLES ELMORE DROPLEY  
CLERK

Nos. **424** and **425**

**In the  
Supreme Court of the United States**

October Term, 1944

No. ....

**KENNECOTT COPPER CORPORATION**, a corpo-  
ration, *Petitioner*,

vs.

**STATE TAX COMMISSION**; and **J. LAMBERT  
GIBSON, ROSCOE E. HAMMOND, MILTON  
TWITCHELL**, and **HEBER BENNION, JR.**, con-  
stituting said State Tax Commission, *Respondents*.

No. ....

**SILVER KING COALITION MINES COMPANY**, a  
corporation, *Petitioner*;

vs.

**STATE TAX COMMISSION**; and **J. LAMBERT  
GIBSON, ROSCOE E. HAMMOND, MILTON  
TWITCHELL**, and **HEBER BENNION, JR.**, con-  
stituting said State Tax Commission, *Respondents*.

**PETITIONS FOR WRITS OF CERTIORARI TO  
THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE TENTH CIRCUIT**

**C. C. PARSONS,  
WM. M. McCREA  
A. D. MOFFAT,**  
SALT LAKE CITY, UTAH,

**H. THOMAS AUSTERN,**  
WASHINGTON, D. C.,

Attorneys for Petitioner,  
Kennecott Copper Corporation,

**C. C. PARSONS,** **R. J. HOGAN,**  
SALT LAKE CITY, UTAH, SALT LAKE CITY, UTAH,  
Attorneys for Petitioner,  
Silver King Coalition Mines Company

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**In The**  
**Supreme Court of the United States**

Nos. .... and .....

October Term, 1944

No. ....

**KENNECOTT COPPER CORPORATION**, a corporation,

*Petitioner,*

vs.

**STATE TAX COMMISSION; and J. LAMBERT GIBSON, ROSCOE E. HAMMOND, MILTON TWITCHELL, and HEBER BENNION, JR.**, constituting said State Tax Commission,

*Respondents.*

No. ....

**SILVER KING COALITION MINES COMPANY**, a corporation,

*Petitioner,*

vs.

**STATE TAX COMMISSION; and J. LAMBERT GIBSON, ROSCOE E. HAMMOND, MILTON TWITCHELL, and HEBER BENNION, JR.**, constituting said State Tax Commission,

*Respondents.*

**PETITIONS FOR WRITS OF CERTIORARI TO  
THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE TENTH CIRCUIT**

To the Honorable Chief Justice and Associate Justices of the  
Supreme Court of the United States: ©

Petitioners pray that writs of certiorari be issued to  
review the respective judgments of the United States Circuit  
Court of Appeals for the Tenth Circuit entered July 23, 1945.  
(R. 169, 170).



## OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Tenth Circuit and the dissenting opinion of Judge Orie L. Phillipps will be found at pages 159 and 165 of the record; they are not reported as yet. The opinion of the United States District Court for the District of Utah, Central Division (R. 37) is reported in 60 F. Supp. 181.

## JURISDICTION

The judgments of the Circuit Court of Appeals were entered July 23, 1945 (R. 169, 170). The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. [28 U. S. C. A. § 347(a)].

## QUESTIONS PRESENTED

The questions presented are:

(1) Whether §§ 80-5-76 and 80-11-11, Utah Code Annotated 1943, authorizing the taxpayer to sue the State "in any court of competent jurisdiction" to recover an occupation tax paid under protest, waive the immunity of the State to suit in a Federal court.

(2) Whether a taxpayer who sues the State Tax Commission of Utah and the individuals comprising the Commission for the amount of an unlawful and wholly unauthorized tax paid under protest, thereby sues the State of Utah exclusively and deprives the Federal court of jurisdiction over any of the defendants, unless the State shall have waived its immunity to suit in a Federal court.

**STATUTES INVOLVED**

Section 80-5-66, Utah Code Ann. 1943, whereby an occupation tax is imposed on every person engaged in the business of mining or producing valuable metalliferous ore "equal to one per cent of the gross amount received for or the gross value of metalliferous ore sold," an excise, levied upon the gross amount received from sales of ore or metals.

Section 80-5-81, Utah Code Ann. 1943, whereby it is provided that all such taxes shall be paid to the State Tax Commission.

Section 80-5-76, Utah Code Ann. 1943, whereby it is provided that "any taxpayer may pay his occupation tax under protest and thereafter bring an action in any court of competent jurisdiction for the return thereof as provided by § 80-11-11, Revised Statutes of Utah, 1933."

Section 80-11-11, *supra*, whereby it is provided that where a party, whose property is taxed, or from whom a tax is demanded or enforced, deems such tax unlawful, he may pay the same under protest to the officers designated and authorized by law to collect the same, and thereupon "may bring an action in any court of competent jurisdiction against the officer to whom said tax . . . was paid, or against the state, county, municipality or other taxing unit on whose behalf the same was collected, to recover said tax."

Section 80-11-13, Utah Code Annotated 1943, whereby it is provided that taxes paid to the State under protest should not be covered into the general fund but should be held and retained by the State Treasurer and not be expended until it shall have been finally determined that such tax had been lawfully or unlawfully collected.

The pertinent portions of the several statutes referred to are set forth in the appendix, *infra*, pages I and II.

There is nothing in the Utah statutes indicating an intention on the part of the legislature that the phrase "any court of competent jurisdiction" should not embrace the Federal courts.

The Emergency Price Control Act of 1942, approved January 30, 1942 [56 Stat. 23, as amended October 2, 1942; 56 Stat. 767; 50 U. S. C. Appendix 901, 902(e)], the purpose of which among others was to secure the maximum necessary production of any commodity essential to the prosecution of the war and for that purpose to make subsidy payments to domestic producers in such amounts as might be determined to be necessary to obtain maximum necessary production.

Executive Order No. 9250, Title V, as amended by Executive Order No. 9281 (50 U. S. C. Appendix, § 901, p. 316) pursuant to authority conferred by the Emergency Price Control Act of 1942 by which order Metals Reserve Company was authorized to subsidize, if such measure were necessary to insure the maximum production of any commodity necessary to the successful prosecution of the war.

The Second War Powers Act, being the Act of June 28, 1940 (54 Stat. 676), as amended March 27, 1942, ch. 199, Title III, § 201 (56 Stat. 177, 50 U. S. C. Appendix § 633, p. 258) whereby the President of the United States was authorized to allocate all production in such manner as he should deem necessary or appropriate in the public interest and to promote the national defense.

Executive Order No. 8734, April 11, 1941, as amended by Executive Order No. 8875, August 28, 1941 (Vol. 9, U. S. C. Cong. Serv. 1941, pp. 852, 867), whereby the Office of Price Administration was created and the administrator's duties were defined, among which duties was that of prescribing maximum prices and all elements of cost or price of materials or commodities and enforcing their observance; and pursuant to authority thus conferred upon it, the Office of Price Administration on August 12, 1941, established a ceiling price for copper of 12c per pound (Price Schedule No. 15, 6 Fed. Reg. 4008). And on January 13, 1942, the Administrator issued Price Schedule No. 69 (7 Fed. Reg. 284) which fixed the maximum price for primary lead at 6 $\frac{1}{2}$ c per pound. And on January 28, 1942, the Administrator issued Price Schedule No. 81 (7 Fed. Reg. 601) fixing the maximum price for primary slab zinc at 8 $\frac{1}{4}$ c per pound.

Executive Order No. 9024 (Vol. 1, Cumulative Supplement, Code of Federal Register of U. S. A., p. 1070) issued January 16, 1942, whereby the President of the United States created the War Production Board, established a chairman, and among other things authorized and empowered him to exercise general direction over the war procurement and production program; and on February 9, 1942, in order to stimulate increased production for the war effort, the War Production Board and Office of Price Administration issued a joint statement (R. 107) providing for subsidies supplementary to the ceiling prices for these metals to be paid by Metals Reserve Company for production in excess of quotas fixed for the various producers. Metals Reserve Company did *not* thereby agree to purchase any ore (R. 75) but pursuant to the order has paid subsidies for production

in excess of quotas of 5c per pound for copper,  $2\frac{3}{4}$ c per pound for zinc, and  $2\frac{3}{4}$ c per pound for lead.

Article I, Sec. 8 of the Constitution of the United States, empowering Congress to declare war and prosecute the same; and Article I, Sec. 10 of the Constitution of the United States denying that power to the states.

Fourteenth Amendment to the Constitution of the United States, wherein it is provided that no state shall deprive any person of property without due process of law.

### STATEMENT

May 11, 1937, the State of Utah imposed on all persons engaged in the business of mining "an occupation tax equal to one per cent of the gross amount received for, or the gross value of, metalliferous ore sold" during the calendar year then next preceding; the tax was an excise levied upon the gross amount received from sales of ore or metals. (§ 80-5-66, Utah Code Annotated 1943). The State Tax Commission was empowered to administer the Act.

During the year 1943 the National Government paid to petitioners and other mining companies similarly engaged subsidies to stimulate their production of metals critically essential to the prosecution of the war. In 1944 respondents exacted of petitioners one per cent of the subsidies so paid petitioners respectively, as for the occupation tax, and accordingly petitioner Kennecott Copper Corporation, a citizen of New York, and petitioner Silver King Coalition Mines Company, a citizen of Nevada, paid to the respondent State Tax Commission under protest \$37,814.22 and \$4533.54, respectively. Petitioners then instituted these suits against the

State Tax Commission and the individuals constituting the commission, in the United States District Court for the District of Utah, to recover the sums paid. The two suits were consolidated for purpose of trial, were briefed and argued together in the United States Circuit Court of Appeals, and were so treated in the opinion of the Circuit Court of Appeals.

Two bases for jurisdiction are alleged by petitioners in their respective complaints (R. 1, 129); first, diversity of citizenship and the jurisdictional amount, Judicial Code, § 24(1), and second, the existence of a federal question, the consent of the State of Utah to be sued in the federal courts and the jurisdictional amount, Judicial Code § 24(1).

Petitioners charged respondents with interfering with the exercise of the federal war power, and with depriving petitioners of their property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States. More specifically, it is charged that these seizures were a direct levy upon the means employed by the National Government to successfully wage a war, were an unlawful diversion to the general purposes of the State of a part of the subsidies paid by the National Government, a diversion from the stated purpose of their payment, without the consent of the National Government. The Congress of the United States had conferred no right upon the states to tax those special allowances, or in any manner or at all to dissipate them or make them a source of revenue to the State, and it is charged that that power is not possessed by either respondents or the State. And it was further charged that the subsidy payments were not "the



amount of money or its equivalent actually received \*\*\* from the sale" of ore or metals, it being here stipulated that "Metals Reserve Company does not purchase the ore on account of the production of which it pays premiums to the producers." (Par. 18, Stipulation of Facts, R. 75.) And it was charged that these exactions were without authority from the State of Utah, were in excess of respondents' powers, or the powers of any of them, and were an usurpation of power. (R. 9, 10, 136, 137.) Judgments were entered by the District Court against all the respondents as prayed. (R. 29, 152.) The Circuit Court of Appeals reversed and remanded with directions to dismiss on the grounds that the suits were against the State solely and that the State had consented to be sued only in the State courts. Judge Phillips dissented, finding a comprehensive waiver of sovereign immunity, a waiver that included authority to sue the State in the Federal district court.

The serious consequence of the misconstruction by the Court below cannot be gainsaid. In the instant case petitioners, whose case was deemed meritorious in the District Court, are denied access to a Federal tribunal, and will, in all probability, be met in the State courts by the contention that their actions are barred by the six months' statute of limitations of the State of Utah. *State v. District Court of Salt Lake County*, 102 Utah 284, 115 P. (2d) 913.

### **REASONS FOR GRANTING THE WRITS**

1. The Circuit Court of Appeals, Tenth Circuit, has decided an important question of general law in a way untenable and in conflict with not merely the weight of authority but with all authority upon the subject. We submit that

the State of Utah has consented to be sued in the Federal courts.

Section 80-11-11, Utah Code Ann. 1943, was first enacted April 5, 1896, in substantially its present form (Laws of Utah 1896, Ch. CXXIX, Sec. 180, p. 466<sup>1</sup>), and has been in effect at all times since. This section as enacted and re-enacted appears without alteration in—

R. S. of Utah 1898, Sec. 2684.

Comp. Laws of Utah 1907, Sec. 2684.

Comp. Laws of Utah 1917, Sec. 6094.

In 1933 the section was reenacted with the addition of the words "state \*\*\* or other taxing unit" to read as follows:

80-11-11. In all cases of levy of taxes, licenses, or other demands for public revenue which is deemed unlawful by the party whose property is thus taxed, or from whom such tax or license is demanded or enforced, such party may pay under protest such tax or license, or any part thereof deemed unlawful, to the officers designated and authorized by law to collect the same; and thereupon the party so paying or his legal representative may bring an action in any court of competent jurisdiction against the officer to whom said tax or license was paid, or against the state,

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<sup>1</sup> \*\*\* Sec. 180. That in all cases of levy of taxes, licenses or other demands for public revenue which is deemed unlawful by the party whose property is thus taxed, or from whom such tax or license is demanded or enforced, such property may pay under protest such tax or license, or any part thereof deemed unlawful, to the officers designated and authorized by law to collect the same; and thereupon the party so paying or his legal representative may bring an action in any court of competent jurisdiction against the officer to whom said tax or license was paid or against the county or municipality on whose behalf the same was collected, to recover said tax or license or any portion thereof paid under protest.

county, municipality or other taxing unit on whose behalf the same was collected, to recover said tax or license or any portion thereof paid under protest. (Sec. 80-11-11, Rev. Stat. of Utah 1933.)

As such the section will be found in Utah Code Ann. 1943 as Sec. 80-11-11. With the single amendment in 1933, supra, Sec. 80-11-11, Utah Code Ann. 1943, is as enacted by the first legislature of the State of Utah in its first year of statehood.

R. S. Sec. 2326, Act of Congress of May 10, 1872 (30 U. S. C. A. Sec. 30)<sup>2</sup>, had been a rule of thumb throughout the mining states of Colorado, Utah, Nevada, California and others west of the Rocky Mountains, the principal occupation of which was mining. In Sec. 80-11-11 as enacted April 5, 1896, the Utah legislature substituted the word "any" for "a", making the phrase read "any court of competent jurisdiction." As then carried into the Utah statutes the phrase had a uniformly accepted meaning in the State of Utah and elsewhere to include Federal as well as State courts.<sup>3</sup> That

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\*\*\* It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; \*\*\*

<sup>2</sup> *Blackburn v. Portland Gold Mining Co.*, 175 U. S. 571, 20 S. Ct. 222, 44 L. Ed. 276, at 280.

*Shoshone Mining Co. v. Rutter*, 177 U. S. 505, 506; 20 S. Ct. 726, 44 L. ed. 864.

*Chambers & Others v. Harrington & Another*. Appeal from the Supreme Court of the Territory of Utah.—Decided April 14th, 1884. 4 S. Ct. 428, 28 L. ed. 452, 111 U. S. 350.

*Perego v. Dodge*, 163 U. S. 160, 16 S. Ct. 971, 41 L. ed. 113. (Appeal from a judgment of the Supreme Court of the Territory of Utah, decided May 18, 1896.)

*Burke v. M'Donald*, 2 Idaho (Hasb.) 339, 13 P. 351.

such had continued to be its accepted meaning is apparent by frequent recourse to the Federal courts for relief under its terms without question by the taxing authorities or by this Court or by the Circuit Courts of Appeal for the Eighth and Tenth Circuits.<sup>4</sup>

Since the question of Federal court jurisdiction under Section 80-11-11 cannot be determined in State court suits, conflicts will not arise with a State court decision on this issue. It is submitted, however, that the instant case is contrary to the interpretation accepted and approved by this Court and the Eighth and Tenth Circuits in all cases instituted in the Federal courts under Section 80-11-11. While it is apparent that a suit against a county does not require waiver of sovereign immunity<sup>5</sup>, still a suit under Section 80-11-11 in a Federal court as one of the courts of competent jurisdiction cannot be authorized for some taxing units and

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<sup>4</sup> *Basset v. Utah Copper Co.*, 219 F. 811, decided Nov. 14, 1914.  
*South Utah Mines & Smelters v. Beaver County*, 262 U. S. 325, 43 S. Ct. 577, 67 L. ed. 1004, decided May 21, 1923.

*Salt Lake County v. Utah Copper Co.*, 294 F. 199, decided Nov. 12, 1923; certiorari denied 264 U. S. 590, 44 S. Ct. 403, 68 L. ed. 864; error dismissed 267 U. S. 610, 45 S. Ct. 461, 69 L. ed. 813.

*Beaver County v. South Utah Mines & Smelters*, 17 F. (2d) 577, decided Jan. 4, 1927; certiorari denied 274 U. S. 746, 47 S. Ct. 659, 71 L. ed. 1328.

*Salt Lake County v. Utah Copper Co.*, 93 F. (2d) 127, decided Nov. 22, 1937, certiorari denied 303 U. S. 652, 58 S. Ct. 750, 82 L. ed. 1112.

<sup>5</sup> These suits were instituted against the counties to whom the tax collecting function had been delegated. The State, however, shared in the proceeds, and its Attorney General or his deputies participated in the Federal litigation.

not for others, for there is but one phrase and the Federal courts must be deemed included for all officers and units that may be sued under the section. If the language means "any *State* court of competent jurisdiction," it is equally applicable to suits against counties. If the language means "*any* court of competent jurisdiction," it is equally applicable to suits against the State.

April 14, 1884, the phrase "a court of competent jurisdiction" was construed by this Court in a jurisdictional controversy arising out of the Territory of Utah as undoubtedly to mean "a court of general jurisdiction, whether it be a State court or a Federal court." *Chambers & Others v. Harrington & Another*, 111 U. S. 350, 4 St. Ct. 428, 28 L. ed. 452. By the 1933 amendment the State as such was brought within the provisions of Section 80-11-11, and the statute, then for the period of thirty-seven years, had been uniformly interpreted to embrace the Federal courts within the language "any court of competent jurisdiction," language that neither expresses nor implies a limitation of the State's consent to be sued, to a suit in the State courts only. (*Finn v. Meighan*, ..... U. S. ...., 89 L. ed. Vol. 15, Adv. Op. p. 1086) And there is no contextual expression from which such a limitation could be implied. In the clear light of this settled, administrative and judicial practice and construction, the legislature in 1933 added the State itself to the coverage of Section 80-11-11 without any effort to limit the then existing accepted construction of the section as embracing Federal court suits.

Furthermore, when Section 80-5-76 was enacted in 1937, making Section 80-11-11 applicable to suits for refund of occupation taxes paid under protest, the State's purpose to

authorize Federal court action was again reiterated. The phrase as it appears in Section 80-5-76 occurs in the following context:

80-5-76. No court of this state except the supreme court shall have jurisdiction to review, alter, or annul any decision of the tax commission or to suspend or delay the operation or execution thereof; provided, any taxpayer may pay his occupation tax under protest and thereafter bring an action in any court of competent jurisdiction for the return thereof as provided by Section 80-11-11, Revised Statutes of Utah, 1933.

After providing that, of the State courts, the Supreme Court alone should have jurisdiction to review any decision of the State Tax Commission, the statute deliberately states the exception in the words "*provided*, any taxpayer may pay his occupation tax under protest and thereafter bring an action in any court of competent jurisdiction for the return thereof as provided by Section 80-11-11, Revised Statutes of Utah, 1933." The majority of the Court below flagrantly misconstrued Section 80-5-76 as showing a policy of review of tax commission decisions only in the Supreme Court of the State. The section specifically excludes the occupation tax where payment has been made under protest. A suit under Section 80-11-11 would not lie in the Supreme Court. The very purpose of the exception was to enable a taxpayer who had paid his tax under protest, to institute suit in a Federal court for recovery of the sum paid. The exception would not have been stated merely to authorize suit in the State's inferior courts, having already provided for complete review in the State's Supreme Court.

Moreover, the phrase "any court of competent jurisdiction," where not limited by the context, has been held without



exception to include both Federal and State courts indiscriminately, the facts otherwise essential to Federal jurisdiction being present.\*

With this background we submit that it must be clear that "any court of competent jurisdiction" is used in the Utah statute in its ordinary and usual significance as generally understood, i. e., the one settled and uniformly recognized meaning of "each one of all" and to include State and Federal courts indiscriminately where the facts otherwise require

\* Under Sec. 77, sub. j, of the Bankruptcy Act, 11 U. S. C. A. Sec. 205, sub. j:

In re Chicago & E. I. Ry. Co. *Gourley v. Wham* CCA 7th, 121 F. 2d 785.

Under the Emergency Price Control Act of 1912, 50 U. S. C. A. Appendix Sec. 901, et seq:

*Regan v. Kroger Grocery & Baking Co.* (Brown, Administrator of Office of Price Administration, Intervener), 386 Ill. 284, 54 N. E. 2d 210.

*Miller v. Municipal Court of City of Los Angeles, et al.*, 22 Cal. 2d 818, 142 P. 2d 297,

*Hall v. Chaltis* (Dist. of Col.), 31 A. 2d 699.

Under the Internal Revenue Act of July 13, 1866, Sec. 19:

*The Collector v. Hubbard*, 79 U. S. (12 Wall.) 1, 14; 20 L. ed. 272.

Under the Fair Labor Standards Act (29 U. S. C. A. Sec. 201 et seq.):

*Stringer v. Griffin Grocery Co.*, 149 S. W. 2d 158,

*Booth v. Montgomery Ward & Co., Inc.*, 44 F. Supp. 451,

*Dennis v. Equitable Equipment Co. (La.)* 7 So. 2d 397,

*Donahue v. Susquehanna Collieries Co.*, CCA 3, 138 F. 2d 3,

*Hargrave v. Mid-Continent Petroleum Corp.*, 36 F. Supp. 233,

*Wingate v. General Auto Parts Co.*, 40 F. Supp. 364.

to Federal jurisdiction are present. Such was its meaning in 1933 when Section 80-11-11 was amended to expressly include the State of Utah in its waiver of immunity to suit "in any court of competent jurisdiction."

2. The Circuit Court of Appeals, Tenth Circuit, has decided an important question of Federal law, which has not, but should be settled by this Court. The decision below has misinterpreted and misapplied two recent decisions of this Court and it is therefore essential that the law be further clarified. The majority opinion was grounded on *Great Northern Insurance Co. v. Read*, 322 U. S. 47, and *Ford Motor Co. v. Dept. of Treasury*, 323 U. S. 459. Judge Phillips in his dissent pointed out that these cases were clearly distinguishable from the instant case. The sweeping application

Generally:

*National Sash & Door Co., Inc., v. Continental Casualty Co.*,  
CCA 5th, 37 F. 2d 342,

*James Freeman Brown Co. vs. Harris*, (CCA 4th) 139 F. 103,

*Robertson v. Railroad Labor Board*, 268 U. S. 619, 45 S. Ct.  
621, 69 L. ed. 1119.

The word "any" is equivalent to, and has the force of every or each one of all:

*Hopkins v. Sanders*, 172 Mich. 227, 137 N. W. 709, 713,

*Roedler v. Vandalia Bus Lines, Inc.*, 281 Ill. App. 520, 523,

*Heyler v. City of Watertown*, 16 S. D. 25, 91 N. W. 334,

*People v. Van Cleave*, 187 Ill. 125, 58 N. E. 422, 425,

*Bouvier's Law Dictionary, Unabridged, Rawle's 3d Rev.*,  
Vol. 1, p. 205.

The word "any" is all comprehensive and unless limited by the context, includes all persons and things referred to indiscriminately:

*Orme v. Atlas Gas & Oil Co.*, ..... Minn. ...., 13 N. W. 2d  
757, 763,

*Stout v. Simpson*, 34 Okla. 129, 124 P. 754, 756.

given these cases by the majority below would require nothing short of express mention in the statute of a Federal court as being within the ambit of the consent to be sued. That is not the rule stemming from the facts developed in the Great Northern Insurance Co. and Ford Motor Co. cases. Nor can that rule be deduced from the language in the Great Northern Insurance Co. case that Federal courts should not "be astute to read the consent to embrace Federal as well as State courts." A clear intent to submit to suit in the Federal courts can be found from the history of these Utah enactments and the language used therein. See point 1, *supra*.

It should be apparent that the two decisions of this Court at the past two terms do not require a flat expression of consent to suit in a Federal court. It has long been clear that no such flat expression is required for a waiver of the immunity of the United States to suit in State courts. Mr. Justice Brandeis, in *Minnesota v. United States*, 305 U. S. 382, 389-90, stated: "The United States argues that a statute granting permission to sue the United States must be construed to apply only to the Federal courts unless there is an explicit reference to the state tribunals . . . This is not universally true even as to suits against the United States . . .", citing *United States v. Jones*, 109 U. S. 513.

As Judge Phillips pointed out in his dissent, the Great Northern Insurance Co. case involved an Oklahoma statute giving precedence to suits brought under its provisions and directing the form of judgment to be entered. A Federal court could not be obligated to give the case precedence and this Court pointed out that "the kind of judgment to be returned . . . is quite different in language, if not in effect,

from the judgment a Federal court would render." The Court rested on the limitations, implicit and expressed, in Oklahoma statute.

Directing further attention to the Oklahoma statutes there involved, Session Laws 1915, Ch. 107, Art. 1, Sub-division B, it will be found that Section 1 provides that appeals taken from all boards of equalization "shall have precedence in the court to which they are taken." Section 2 provides a proceeding before the county board of equalization upon a complaint in writing and evidence adduced upon issues so framed:

\*\*\* And the stenographer of the County Court, is directed, at the request of the Board or taxpayer, to take shorthand notes of such testimony and to transcribe such complaint and evidence, and a full transcript of the action of the Board thereon and file the same with his certificate as to his accuracy in the district court, the filing of which transcript shall complete said appeal which shall, in due course, be examined and reviewed by said court and affirmed, modified or annulled as justice shall demand. \*\*\*

Section 3 prescribes a similar proceeding before the State Board of Equalization. Section 4 provides that the appellate court "shall presume in favor of said Board any facts, circumstances or information of general knowledge in the particular business whose property was assessed by it"; Section 5 that "the remedies of resort to the Boards and appeal therefrom shall be the sole remedies for the correction of assessment or equalization." Such prescribed and exclusive procedures cannot be reconciled with the conduct of a suit in a Federal court. An express consent by the State to be sued in either the State or Federal courts is not to be found

in the Oklahoma statutes. The statutes of that State and the course of judicial decision thereunder manifest an intention to preserve the State's immunity from suit and, where waived, to limit consent to the courts of that State only.

Judge Phillips also pointed out in his dissent that the Ford Motor Co. case, decided by this Court last term, involved a statute providing in Section 64-2614(a):

"Any person improperly charged with any tax provided for under the terms of this act, and required to pay the same, may recover any amount thus improperly collected, together with interest, in any proper action or suit against the department in any court of competent jurisdiction; *and the circuit or superior court of the county in which the taxpayer resides or is located shall have original jurisdiction of action to recover any amount improperly collected . . .*" (Italics supplied.)

The concluding language of the Indiana statute (which is wholly different from the Utah enactment here involved) was deemed highly persuasive by this Court. The Court specifically pointed out that,

"The provision in this section which vests original jurisdiction of suits for refund in the 'circuit or superior court of the county in which the taxpayer resides or is located' indicates that the state legislature contemplated suit in the state courts. Moreover, this interpretation of § 64-2614(a) to authorize suits only in state courts accords with the state legislative policy. Indiana has adopted a liberal policy towards general contract claimants but confines their suits against the state to state courts." (323 U. S. at 465-6.)

Judge Phillips in his dissent in the present case likewise stressed the latter consideration of Indiana policy to permit suit against it on all claims but only in the superior court of a particular county.

The Utah situation is not comparable to that prevailing under the Indiana and Oklahoma statutes. The Utah public policy is and has been an extremely liberal one in permitting suit in State and Federal courts. Thus in 1939 the State consented to be sued "in any court of this state or of the United States" for recovery of real or personal property or in other actions pertaining to mortgage and lien foreclosure and other property disputes.<sup>7</sup>

Futhermore, it is apparent from the previous discussion that Section 80-11-11 had received a uniform construction of authorizing Federal court action.

Utah's consent to be sued is express and is phrased in comprehensive language that had been judicially construed by this Court before the enactment of Section 80-11-11 in 1896, to embrace the Federal courts in jurisdictional controversies arising in the Territory of Utah, language that has been similarly construed in a great number of applications throughout the United States without dissent over more than half a century.

The question of the propriety of the interpretation placed upon the Great Northern Insurance Co. and Ford Motor

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<sup>7</sup> Sec. 104-3-27 of the Utah Code Ann. 1943, reads in part:

"\*\*\* the consent of the state of Utah is given to be named a party in any suit which is now pending or which may hereafter be brought in any court of this state or of the United States for the recovery of any property real or personal or for the possession thereof or to quiet title thereto, or to foreclose mortgages or other liens thereon or to determine any adverse claim thereof, or secure an adjudication touching any mortgage or other lien the State of Utah may have or claim on the property involved. \*\*\*"



Co. cases presents an important matter meriting review by this Court.

3. The Court below has decided an important question of local law as to the suability of individuals for unlawful conduct, in conflict with Utah law.

The Court below held that though the State Tax Commission was not the only party defendant but had as co-defendants the individual members, charged with unlawful and unauthorized exaction of funds, the suit was nevertheless exclusively against the State. It therefore found it necessary to consider whether the sovereign had consented to be sued in the Federal court and ordered the action dismissed upon concluding it had not. The line of reasoning followed to reach this result was that the impact of the judgment is felt by the State and that therefore it is the real party in interest. Support for this conclusion was thought to be found in Section 80-11-13 of the Code providing for segregation of funds paid under protest. (App. II.) Since, the Court reasoned, if the State were properly subjected to suit, it would be required to pay a judgment against it, it was concluded that the State alone was the real party in interest. The Court below went on to find that in the present proceedings the State was not subject to having a judgment entered against it. It is<sup>o</sup> indeed ironical then to conclude that the suit against the individual commissioners was a suit against the State because the State would be obliged to pay the judgment.\*

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\* But "pending determination as to whom the money belongs, the State has no more claim to or control over the money than the taxpayer." Concurring opinion of Justice Larsen, *State v. District Court of Salt Lake County, et al.*, 102 Utah 284, at 289, 115 P. 2d 913, at 916.

The net effect and meaning of the decision below is that the suit against the individual commissioners cannot be distinguished from that against the State Tax Commission. This is wholly contrary to Utah law. In *State, by State Road Commission, et al., v. District Court, Fourth Judicial District*, 94 Utah 384, 78 P. (2d) 502 (1938), the Supreme Court of Utah held that a suit insofar as it was brought against the Road Commission, an agency of the State, was against the State itself and that the State had not given its consent. It then considered the possibility of obtaining relief against the *individual members* of the Road Commission, though recognizing (94 Utah at 390, 78 P. (2d) at 505) that the effect of relief against the individuals "will be to coerce the State into paying . . . damages, or permanently prevent the State from carrying out the proposed highway improvement." The court posed the question (94 Utah at 392, 78 P. (2d) at 506): "Can the members of the Road Commission, if sued as individuals, avoid the injunction by asserting that they are acting as an agency of the State and the State cannot be sued?" It concluded that the suit against the individual members was an entirely different matter. "It must not be said that any officer of the State is not amenable to the process of the courts for violation of the law. The immunity of the State from suit cannot be successfully invoked by any official, high or low, to prevent the courts from enjoining an act forbidden by law." (94 Utah at 405, 78 P. (2d) at 511.)

The State Tax Commission is a creature of the Constitution. It is endowed with the power to sue and be sued in its own name, without qualification or limitation, (Section 80-5-46, Utah Code Annotated 1943). Suits against the State Tax Commission, in the absence of some impelling reason as here,

to sue the individuals comprising it, are properly and customarily instituted against the State Tax Commission in its own name solely.

It may be conceded that under appropriate circumstances when a single state officer, for example, the State Treasurer, is sued, and the State is obligated by statute to pay the judgment, the suit is exclusively against the State. That was the purport of *Great Northern Life Insurance Co. v. Read*, Insurance Commissioner for the State of Oklahoma, 322 U. S. 47. But in the instant case the judgment sought against the Commission and that sought against the individuals comprising it had different foundations in Utah law. Though the State Tax Commission were deemed the State, the relief sought against it can nevertheless be pressed on the grounds that the suit arises under the Constitution and laws of the United States and Utah has consented to be sued in the Federal court. Either the Commission or the State must be sued to bring into operation Section 80-11-13 and the obligation of the State to pay the judgment. But there is no reason why the individual members may not also be sued in the Federal court, both because of the Federal questions and on diversity of citizenship.

Suits maintained against defendants who, while claiming to act as officers of the State, violate and invade the personal and property rights of the plaintiffs under color of authority that in fact had not been conferred, are not suits against the State.\* And not only will it be assumed, for the purpose of

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\* *Worcester County Trust Co. v. Riley*, 302 U. S. 292, 82 L. ed. 268, 274.

*Greene v. Louisville & I. R. R. Co.*, 244 U. S. 499, 37 S. Ct. 673, 61 L. ed. 1280, 1285.

these petitions, that the individual members of the State Tax Commission were acting without authority, but that assumption is fortified by the judgments rendered in eleven suits instituted in the State District Court under the same statutes and for the same relief as here, wherein the State court found that the effort of these respondents, manifest in the instant suits, was without authority. (App. III-VI)

The intention of the complaint to seek judgments against the defendants in their individual capacities is manifest not only in the fact that in part jurisdiction was founded on diversity of citizenship—as to the State, diversity not affording a basis for District Court jurisdiction—but also in the allegations of the complaint that “said seizure by said defendants was, and is, wholly without authority from the State of Utah or otherwise or at all, wholly in excess of the power of said defendants or any of them, \* \* \* (R. 10, 137).

The buttressing argument of the Court below, that it would have been unnecessary for petitioners in their complaint to have pointed out that the funds paid in had been segregated under Section 80-11-13 if it did not contemplate

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Atchison, Topeka & Santa Fe Ry. Co., Plff. in Error, v. Timothy O'Connor, 223 U. S. 280, 56 L. ed. 436.

Hopkins v. Clemson Agricultural College, 221 U. S. 636, 55 L. ed. 890.

Ex Parte Young, 209 U. S. 123, 28 S. Ct. 411, 52 L. ed. 714.

Thomas Poindexter, Plff. in Err., v. Samuel C. Greenhow, Treas. of the City of Richmond, Va., 114 U. S. 270, 29 L. ed. 185.

State Board of Escheats of Michigan v. Klump, et al., 38 F. 2d 625.

State Life Ins. Co. v. Daniel, et al., 6 F. Supp. 1015.

suing the State as such, is entitled to no weight in the light of what has been said. Petitioners sued the State Tax Commission and had cause for belief that that portion of the suit might be deemed a suit against the State. It had every reason to believe under the established Utah law (*State Road Commission v. District Court*, *supra*) that the suit against the individual members was not subject to that interpretation.<sup>10</sup> The complaint was drawn to comply with all the requirements for suit against all the parties. The District Court in fact entered judgments against the individual defendants as such and the State was under no obligation to pay them if execution had been sought against the individuals.

The effect of the decision below is to remove individual liability for unlawful exactions of taxes contrary to all Utah law.

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<sup>10</sup> Section 80-11-11 authorizes suit only against the collecting officer of the State. The collecting officer was the State Tax Commission and not the individual commissioners. The suit against the latter has a non-statutory basis. There is no authority in Section 80-11-13 for payment from segregated funds of judgments obtained against individuals in non-statutory suits.

### CONCLUSION

It is respectfully submitted that the petitions for writs of certiorari should be granted.

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Attorneys for Petitioner,  
Silver King Coalition Mines Company



## APPENDIX

### Utah Code Annotated 1943:

80-5-66.

\* \* \* every person engaged in the business of mining or producing ore containing gold, silver, copper, lead, iron, zinc or other valuable metal in this state shall pay to the state of Utah an occupation tax equal to one per cent of the gross amount received for or the gross value of metalliferous ore sold which tax shall be in addition to all other taxes provided by law. \* \* \*

The basis for computing the occupation tax imposed by this act for any year shall be as follows:

(a) If the ore or metals extracted is sold under a bona fide contract of sale the amount of money or its equivalent actually received by the owner, lessee, contractor or other person operating the mine or mining claim from the sale of all ores or metals during the calendar year \* \* \*

80-5-81.

All occupation taxes imposed and collected under this act shall be paid to the state tax commission, and by it promptly paid over to the state treasurer, and by him credited to the state general fund.

80-5-76.

No court of this state except the supreme court shall have jurisdiction to review, alter, or annul any decision of the tax commission or to suspend or delay the operation or execution thereof; *provided*, any taxpayer may pay his occupation tax under protest and thereafter bring an action in any court of competent jurisdiction for the return thereof as provided by section 80-11-11, Revised Statutes of Utah, 1933.

4  
/ II. KENNECOTT COP. CORP. & SILVER KING COAL M. CO.

80-11-11.

In all cases of levy of taxes, licenses, or other demands for public revenue which is deemed unlawful by the party whose property is thus taxed, or from whom such tax or license is demanded or enforced, such party may pay under protest such tax or license, or any part thereof deemed unlawful, to the officers designated and authorized by law to collect the same; and thereupon the party so paying or his legal representative may bring an action in any court of competent jurisdiction against the officer to whom said tax or license was paid, or against the state, county, municipality or other taxing unit on whose behalf the same was collected, to recover said tax or license or any portion thereof paid under protest.

80-11-13.

In case any tax or license shall be paid to the state under protest, said tax or license so paid shall not be covered into the general fund but shall be held and retained by the state treasurer and shall not be expended until the time for the filing of an action for the recovery of said tax or license shall have expired, and in case an action has been filed, until it shall have been finally determined that said tax or license was lawfully or was unlawfully collected. If in any such action it shall be finally determined that said tax or license was unlawfully collected, the officer collecting said tax or license shall forthwith approve a claim for the amount of said tax or license adjudged to have been unlawfully collected, together with costs and interest as provided by law, and any excess amount in excess of said tax required to pay said claim, including interest and costs, shall be repaid out of any unappropriated funds in the hands of the state treasurer, or, in case it is necessary, a deficit for said amount shall be authorized.

Opinion of the Honorable M. J. Bronson, Judge Third Judicial District Court of the State of Utah, in and for Salt Lake County, in the suits pending in that court referred to in the opinion.

M. J. BRONSON  
Judge  
Third Judicial District Court  
Salt Lake City, Utah

May 2, 1945.

Mr. Herbert Van Dam,  
Attorney-at-Law,  
Felt Building,

Ingebretsen-Ray-Rawlins & Christensen,  
Attorneys-at-Law,  
Walker Bank Building,

Cheney-Jensen-Marr & Wilkins,  
Attorneys-at-Law,  
Continental Bank Building,

Farnsworth & Van Cott,  
Attorneys-at-Law,  
Walker Bank Building,

Mr. Grover A. Giles,  
Attorney General,  
State Capitol Building,  
Salt Lake City, Utah.

Gentlemen:

I am of the opinion that the premiums or bonus paid by Metals Reserve Company cannot, under the statutes of the State of Utah involved, be considered a part of the "gross proceeds" of bona fide sales of the metal products of plaintiff mining companies, but that such payments constitute an inducement to increase production, adding nothing to the intrinsic value of the metal that would in any way affect its sale price on a free and open market to any independent and unhampered purchaser. The State Tax Commission of Utah, in the opinion of this court, had

#### IV. KENNECOTT COP. CORP. & SILVER KING COAL M. CO.

no authority to levy or collect an occupational tax from the plaintiff mining companies, including in the base used for such purposes, the subsidy payments paid to the plaintiff corporations by the United States Government.

I have, therefore, caused to be entered this day a minute entry of judgment in the following cases as herein set out:

Tintic Standard Mining Company, Plaintiff, v. State Tax Commission, et al, No. 73917. In favor of plaintiff and against the defendants for the sum of \$4,404.94 plus the sum of \$60.20, together with interest on both said sums at the rate of 6% per annum from August 22, 1944, until paid, and for plaintiff's costs of suit.

Eureka Lilly Consolidated Mining Company, Plaintiff, v. State Tax Commission, et al, No. 73916. In favor of plaintiff and against the defendants for the sum of \$107.92 plus the sum of \$1.47, together with interest on both said sums at the rate of 6% per annum from August 22, 1944, until paid, and for plaintiff's costs of suit.

Montana Bingham Consolidated Mining Company, Plaintiff, v. State Tax Commission, et al, No. 73924. In favor of plaintiff and against the defendants for the sum of \$329.59 plus the sum of \$4.55, together with interest on both said sums at the rate of 6% per annum from August 24, 1944, until paid, and for plaintiff's costs of suit.

Chief Consolidated Mining Company, Plaintiff, v. State Tax Commission, et al, No. 73923. In favor of plaintiff and against the defendants for the sum of \$4,922.39 plus \$60.73, together with interest on both said sums at the rate of 6% per annum from August 24, 1944, until paid, and for plaintiff's costs of suit.

Colorado Consolidated Mines Company, Plaintiff, v. State Tax Commission, et al, No. 73918. In favor of plaintiff and against the defendants for the sum of \$137.58 plus \$1.88, together with interest on both

said sums at the rate of 6% per annum from August 22, 1944, until paid, and for plaintiff's costs of suit.

Eureka Bullion Mining Company, Plaintiff, v. State Tax Commission, et al, No. 74001. In favor of plaintiff and against the defendants for the sum of \$72.43, together with interest on said sum at the rate of 6% per annum from August 23, 1944, until paid, and for plaintiff's costs of suit.

U. S. Smelting, Refining and Mining Company, Plaintiff, v. State Tax Commission, et al, No. 73925. In favor of plaintiff and against the defendants for the sum of \$1,235.68 plus \$17.06, together with interest on both said sums at the rate of 6% per annum from August 24, 1944, until paid, and for plaintiff's costs of suit.

International Smelting and Refining Company, Plaintiff, v. State Tax Commission, et al, No. 74002. In favor of plaintiff and against the defendants for the sum of \$262.50, together with interest on said sum at the rate of 6% per annum from August 23, 1944, until paid, and for plaintiff's costs of suit.

National Tunnel and Mines Company, Plaintiff, v. State Tax Commission, et al, No. 74003. In favor of plaintiff and against the defendants for the sum of \$8,991.90, together with interest on said sum at the rate of 6% per annum from August 23, 1944, until paid, and for plaintiff's costs of suit.

Ohio Copper Company of Utah, Plaintiff, v. State Tax Commission, et al, No. 74004. In favor of plaintiff and against the defendants for the sum of \$1,448.66, together with interest on said sum at the rate of 6% per annum from August 23, 1944, until paid, and for plaintiff's costs of suit.

Combined Metals Reduction Company, Plaintiff, v. State Tax Commission, et al, No. 73850. In favor of plaintiff and against the defendants for the sum of \$5,103.61 plus \$53.70, together with interest on both said sums at the rate of 6% per annum from

VI. KENNECOTT COP. CORP. & SILVER KING COAL. M. CO.

August 2, 1944, until paid, and for plaintiff's costs of suit.

Findings of fact and conclusions of law having been waived by counsel upon stipulation entered in all the foregoing cases it is requested that counsel for plaintiffs in all of said cases prepare judgments in accordance herewith for signature by the court.

Very truly yours,

(Sgd) M. J. BRONSON  
District Judge



FILE COPY

Office - Supreme Court, U. S.

FILED

JAN 21 1946

CHARLES ELMORE GROFLEY  
CLERK

Nos. 424 and 425

**IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1945**

**No. 424**

**KENNECOTT COPPER CORPORATION, A CORPORATION,**  
*Petitioner.*

*vs.*

**STATE TAX COMMISSION; AND J. LAMBERT  
GIBSON, ROSCOE E. HAMMOND, MILTON  
TWITCHELL, AND HEBER BENNION, Jr., CONSTI-  
TUTING SAID STATE TAX COMMISSION,** *Respondents.*

**No. 425**

**SILVER KING COALITION MINES COMPANY, A  
CORPORATION,** *Petitioner,*

*vs.*

**STATE TAX COMMISSION; AND J. LAMBERT  
GIBSON, ROSCOE E. HAMMOND, MILTON  
TWITCHELL, AND HEBER BENNION, Jr., CONSTI-  
TUTING SAID STATE TAX COMMISSION,** *Respondents.*

**ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE TENTH CIRCUIT**

**BRIEF OF PETITIONERS KENNECOTT COPPER  
CORPORATION AND SILVER KING  
COALITION MINES COMPANY**

C. C. PARSONS,  
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**IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1945**

**NO. 424**

KENNECOTT COPPER CORPORATION, A CORPORATION,  
*Petitioner,*

vs.

STATE TAX COMMISSION; AND J. LAMBERT  
GIBSON, ROSCOE E. HAMMOND, MILTON  
TWITCHELL, AND HEBER BENNION, JR., CONSTITUTING  
SAID STATE TAX COMMISSION.

*Respondents.*

**No. 425**

SILVER KING COALITION MINES COMPANY, A  
CORPORATION,

*Petitioner,*

vs.

STATE TAX COMMISSION; AND J. LAMBERT  
GIBSON, ROSCOE E. HAMMOND, MILTON  
TWITCHELL, AND HEBER BENNION, JR., CONSTITUTING  
SAID STATE TAX COMMISSION.

*Respondents.*

**BRIEF OF PETITIONERS KENNECOTT COPPER  
CORPORATION AND SILVER KING  
COALITION MINES COMPANY**

**Opinions Below**

The opinion of the Circuit Court of Appeals for the Tenth Circuit and the dissenting opinion of Judge Orie L. Phillips (R. 141-151) are reported in 150 F. (2d) 905. The opinion of the United States District Court for the District of Utah, Central Division (R-33-36), delivered orally, is reported in 60 F. Supp. 181.

**Jurisdiction**

The judgments of the Circuit Court of Appeals were entered July 23, 1945, (R. 151-152). The petitions for writs

of certiorari were filed and the cases were docketed September 12, 1945. Writs of certiorari were granted November 5, 1945. (R. 152-153) The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1945.

### **Questions Presented**

The questions presented are:

(1) Whether §§ 80-5-76 and 80-11-11, Utah Code Annotated 1943, authorizing the taxpayer to sue the State "in any court of competent jurisdiction" to recover an occupation tax paid under protest, waive the immunity of the State to suit in a Federal court.

(2) Whether a taxpayer who sues the State Tax Commission of Utah and the individuals comprising the Commission for the amount of an unlawful and wholly unauthorized tax paid under protest, thereby sues the State of Utah exclusively and deprives the Federal court of jurisdiction over any of the defendants, unless the State shall have waived its immunity to suit in a Federal court.

### **Statement**

These are suits by petitioners to recover occupation taxes paid under protest to the State Tax Commission of Utah. The validity of the tax is not now in issue, since the Circuit Court of Appeals by a majority opinion concluded that the Federal courts lacked jurisdiction to entertain the suits (R. 141-147), and on that ground alone reversed the judgments of the District Court in favor of petitioners. (R. 26, 137) The issue here is solely that of jurisdiction, but a brief statement of the nature of the case is necessary to a clear understanding of the issue.



Commencing with the year 1937, the State of Utah imposed on all persons engaged in the business of mining "an occupation tax equal to one per cent of the gross amount received for, or the gross value of, metalliferous ore sold" during the preceding calendar year. § 80-5-66, Utah Code Annotated 1943. The State Tax Commission was empowered to administer the Act.

During 1943 the United States paid to petitioners and other mining companies subsidies to stimulate their production of metals critically essential to the prosecution of the war. (R. 38, 78) In fixing the amount of the occupation tax for 1944, respondents included as a part of the "gross amount received for, or the gross value of, metalliferous ore sold" the amount of these federal subsidies. Petitioner Kennecott Copper Corporation, a citizen of New York, and petitioner Silver King Coalition Mines Company, a citizen of Nevada, paid to the respondent State Tax Commission under protest \$37,814.22 and \$4533.54 respectively, representing the occupation tax upon the federal subsidies. (R. 10, 15, 77, 78, 124, 129) Petitioners thereupon instituted these suits against the State Tax Commission and the individuals constituting the Commission in the United States District Court for the District of Utah, seeking judgments against the Commission and the individual defendants for the amount of the alleged unlawful collections. (R. 1, 116)

Two bases for jurisdiction are alleged (R. 1-3; 116-118): (1) diversity of citizenship, inasmuch as the State Tax Commission and the individual members of the Commission are all citizens of Utah and petitioners are citizens of other states; (R. 1-3; 116-118) and (2) the existence of a federal question—more specifically, that this was a direct levy upon

the means employed by the National Government to wage war, constituted an unlawful interference with the exercise of the federal war power, and deprived petitioners of their property without due process of law, contrary to the Fourteenth Amendment. (R. 9-10; 123-124)

After a trial on stipulated facts (R. 38-85) judgments were rendered by the District Court against all of the respondents as prayed. (R. 26, 137) The Circuit Court of Appeals reversed and remanded with directions to dismiss on the ground that the suits were against the State solely and that the State had consented to be sued only in the State courts. Judge Phillips dissented, finding a comprehensive waiver of immunity by the State of Utah, which included authority to sue the State in both state and federal courts.

### **Specification of Errors to Be Urged**

The Circuit Court of Appeals for the Tenth Circuit erred:

1. In holding that the State of Utah had not waived its immunity to suit in a Federal court, to recover an occupation tax paid under protest.

2. In holding that, by suit against the State Tax Commission and against the individual members of the State Tax Commission, for the amount of an occupation tax paid under protest and alleged to be unlawful and unauthorized, petitioners had sued the State of Utah exclusively and had deprived the Federal court of jurisdiction over any of the defendants.

### **Summary of Argument**

By the provisions of the statutes of Utah, the State has consented to be sued in the Federal courts for recovery of

an occupation tax paid under protest, has waived its immunity to suit in both state and federal courts in all actions for recovery of taxes paid under protest. It is not the rule that a statute granting permission to sue the State must be construed to apply to the state courts only unless there be an explicit reference to the federal courts. A statute granting permission to sue the State "in any court of competent jurisdiction," without limitation or qualification either implicit or expressed, embraces within that language state and federal courts indiscriminately where the facts otherwise requisite to federal jurisdiction are present. The actions arise under the Constitution and laws of the United States.

The State Tax Commission is a creature of the Constitution of Utah. It is endowed with the power to sue and be sued in its own name, a power that is unqualified and unlimited. It is an entity separate and distinct from the State, is accordingly capable of acquiring and has acquired citizenship in the State of Utah, and diversity of citizenship as a basis for federal jurisdiction exists as to it.

The individuals comprising the State Tax Commission are here sued in their individual capacities, as citizens of the State of Utah, and diversity of citizenship as a basis for federal jurisdiction exists as to them. Suits maintained against defendants who, while claiming to act as officers of the State, violate and invade the personal and property rights of the plaintiffs under color of authority that in fact had not been conferred, are not suits against the State. The effect of the decision below is, contrary to Utah law, to remove individual liability for unlawful exactions of taxes.

#### **Statutes Involved**

Section 80-5-6, Utah Code Ann. 1943, whereby an occupa-

tion tax is imposed on every person engaged in the business of mining or producing valuable metalliferous ore "equal to one per cent of the gross amount received for or the gross value of metalliferous ore sold," an excise, levied upon the gross amount received from sales of ore or metals.

Section 80-5-81, Utah Code Ann. 1943, whereby it is provided that all such taxes shall be paid to the State Tax Commission.

Section 80-5-76, Utah Code Ann. 1943, whereby it is provided that "any taxpayer may pay his occupation tax under protest and thereafter bring an action in any court of competent jurisdiction for the return thereof as provided by § 80-11-11, Revised Statutes of Utah, 1933."

Section 80-11-11, *supra*, whereby it is provided that where a party, whose property is taxed, or from whom a tax is demanded or enforced, deems such tax unlawful, he may pay the same under protest to the officers designated and authorized by law to collect the same, and thereupon "may bring an action in any court of competent jurisdiction against the officers to whom said tax . . . was paid, or against the state, county, municipality or other taxing unit on whose behalf the same was collected, to recover said tax "

Section 80-11-13, Utah Code Annotated 1943, whereby it is provided that taxes paid to the State under protest should not be covered into the general fund but should be held and retained by the State Treasurer and not be expended until it shall have been finally determined that such tax had been lawfully or unlawfully collected.

The pertinent portions of the several statutes referred to are set forth in the appendix, *infra*, pages I and II.

There is nothing in the Utah statutes indicating an intention on the part of the legislature that the phrase "any court of competent jurisdiction" should not embrace the Federal courts.

The Emergency Price Control Act of 1942, approved January 30, 1942 (56 Stat. 23, as amended October 2, 1942; 56 Stat. 767; 50 U. S. C. Appendix) 901, 902(e), the purpose of which among others was to secure the maximum necessary production of any commodity essential to the prosecution of the war and for that purpose to make subsidy payments to domestic producers in such amounts as might be determined to be necessary to obtain maximum necessary production.

Executive Order No. 9250, Title V, as amended by Executive Order No. 9281 (50 U. S. C. Appendix, § 901, p. 316) pursuant to authority conferred by the Emergency Price Control Act of 1942 by which order Metals Reserve Company was authorized to subsidize, if such measure were necessary to insure the maximum production of any commodity necessary to the successful prosecution of the war.

The Second War Powers Act, being the Act of June 28, 1940 (54 Stat. 676), as amended March 27, 1942, ch. 199, Title III, § 201 (56 Stat. 177, 50 U. S. C. Appendix § 633, p. 258) whereby the President of the United States was authorized to allocate all production in such manner as he should deem necessary or appropriate in the public interest and to promote the national defense.

Executive Order No. 8734, April 11, 1941, as amended by Executive Order No. 8875, August 28, 1941 (Vol. 9 U. S. C. Cong. Serv. 1941, pp. 852, 867), whereby the Office of Price Administration was created and the administrator's duties

were defined, among which duties was that of prescribing maximum prices and all elements of cost or price of materials or commodities and enforcing their observance; and pursuant to authority thus conferred upon it, the Office of Price Administration on August 12, 1941, established a ceiling price for copper of 12c per pound (Price Schedule No. 15, 6 Fed. Reg. 4008). And on January 13, 1942, the Administrator issued Price Schedule No. 69 (7 Fed. Reg. 284) which fixed the maximum price for primary lead at 6½c per pound. And on January 28, 1942, the Administrator issued Price Schedule No. 81 (7 Fed. Reg. 601) fixing the maximum price for primary slab zinc at 8¼c per pound.

Executive Order No. 9024 (Vol. 1, Cumulative Supplement, Code of Federal Register of U. S. A., p. 1070) issued January 16, 1942, whereby the President of the United States created the War Production Board, established a chairman, and among other things authorized and empowered him to exercise general direction over the war procurement and production program; and on February 9, 1942, in order to stimulate increased production for the war effort, the War Production Board and Office of Price Administration issued a joint statement (R. 95-97) providing for subsidies supplementary to the ceiling prices for these metals to be paid by Metals Reserve Company for production in excess of quotas fixed for the various producers. Metals Reserve Company neither agreed to nor did it purchase any ore (R. 69) but pursuant to the order has paid subsidies for production in excess of quotas of 5c per pound for copper, 2¾c per pound for zinc, and 2¾c per pound for lead.

Article I, Sec. 8 of the Constitution of the United States, empowering Congress to declare war and prosecute the same;



and Article I, Sec. 10 of the Constitution of the United States denying that power to the states.

Fourteenth Amendment to the Constitution of the United States, wherein it is provided that no state shall deprive any person of property without due process of law.

## ARGUMENT

### I.

#### Point

**The Utah statutes, authorizing suit "in any court of competent jurisdiction" to recover an occupation tax paid under protest, constitute a waiver by the State of Utah of its immunity to suit in a Federal court.**

Section 80-11-11, Utah Code Annotated 1943, Appendix p. II, authorizes a taxpayer to maintain a suit "in any court of competent jurisdiction against the officer to whom said tax \* \* \* was paid, or against the state, county, municipality or other taxing unit on whose behalf the same was collected." Section 80-5-76, Appendix p. I, reaffirms that authority with respect to the occupation tax. The majority of the court below has now decided, however, that the words "any court of competent jurisdiction" must be read as if they were "any State court of competent jurisdiction." We submit that the decision is wrong, for a number of reasons.

1. Section 80-11-11 is a statutory provision of long standing. It was enacted in the first few months of Utah's statehood (Laws, 1896, Ch. CXXIX, Sec. 180, p. 466) and has been carried into the various revisions and compilations of Utah statutes since that time. Revised Statutes of Utah,

1898, Sec. 2684; Compiled Laws of Utah, 1907, Sec. 2684; Compiled Laws of Utah, 1917, Sec. 6094.

The section has been amended but once, in 1933 (Rev. Stat. of Utah 1933, § 80-11-11). Prior to that time, a taxpayer was authorized to bring suit "in any court of competent jurisdiction" against "the officer to whom said tax was paid or against the county or municipality on whose behalf the same was collected." In 1933, without any limitation on the phrase "in any court of competent jurisdiction," the latter portion was amended to read (new provisions are in italics):

\* \* \* against the officer to whom said tax  
\* \* \* was paid, or against the *state, county, municipality or other taxing unit* on whose behalf the same was collected.

The significance of the addition of the word "state" in 1933 lies in the fact that long prior thereto the section—and particularly the phrase "in any court of competent jurisdiction"—had acquired a well-defined meaning as including Federal courts. Suits had been brought and successfully maintained in the Federal courts pursuant to the permission contained in Section 80-11-11 on several occasions, with no objection on the part of either the State taxing officials or the Federal courts themselves—including this Court. *Bassett v. Utah Copper Co.*, 219 F. 811 (C. C. A. 8th, 1914) (Section 80-11-11 was then Section 2684); *South Utah Mines & Smelters v. Beaver County*, 262 U. S. 325 (1923) (Section 2684); *Salt Lake County v. Utah Copper Co.*, 294 Fed. 199 (C. C. A. 8th, 1923), certiorari denied, 264 U. S. 590, writ of error dismissed, 267 U. S. 610 (Section 80-11-11 was then Section 6094); *Beaver County v. South Utah Mines &*

*Smelters*, 17 F. (2d) 577 (C. C. A. 8th, 1927), certiorari denied, 274 U. S. 746 (Section 6094). Consequently, when the word "state" was added in 1933, it can scarcely be contended that the legislature was unaware of the undoubted fact that "any court of competent jurisdiction," in which it was consenting to be sued, included the Federal courts.

It is apparent, of course, that a suit against a county, such as those above cited, does not require a waiver of sovereign immunity.<sup>1</sup> Under the circumstances, however, to read significance into this fact is to argue that the addition of the word "state" in the amendment of 1933 constituted an implied amendment of the wholly distinct provision "any court of competent jurisdiction" so that it would read "any State court of competent jurisdiction." Plainly, had the legislature contemplated any such amendment, it would have made it, and it did not. A suit in a federal court as one of the courts of competent jurisdiction was not authorized for some taxing units and not others. If the language means "any State court of competent jurisdiction" it is equally applicable to suits against counties; if it means what it says—"any court of competent jurisdiction"—it is equally applicable to suits against the State. It is significant, therefore, that since 1933 the section has continued to receive the interpretation that "any" means "any," and includes the federal courts. *Salt Lake County v. Utah Copper Co.*, 93 F. (2d) 127, (C. C. A. 10th, 1937), certiorari denied, 303 U. S. 652.

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<sup>1</sup> These suits were instituted against the counties to whom the tax collecting function had been delegated. The State, however, shared in the proceeds of the tax, and its Attorney General or his deputies participated in the federal litigation.

2. The phrase "any court of competent jurisdiction" may be traced back to R. S. Sec. 2326, Act of May 10, 1876 (30 U.S.C. Sec. 30).<sup>2</sup> This early mining statute, with its reference to "a court of competent jurisdiction," had been a rule of thumb throughout the mining states of the West—Colorado, Utah, Nevada, California, and others. When Section 80-11-11 was first enacted in 1896, the Utah legislature merely substituted the word "any" for "a"—"any court of competent jurisdiction"—an even broader phrase than that contained in the Federal statute. But even at that time the Federal statute had been uniformly accepted, in Utah and elsewhere, as including both federal and state courts. This court stated, in 1884, in a suit arising out of the Territory of Utah, that the phrase "a court of competent jurisdiction" in R. S. Section 2326 meant "a court of general jurisdiction, whether it be a State court or a Federal court." *Chambers v. Harrington*, 111 U. S. 350, 351. See also *Last Chance Mining Co. v. Tyler Mining Co.*, 157 U. S. 683 (1895); *Pérego v. Dodge*, 163 U. S. 160 (1896); *Burke v. McDonald*, 2 Idaho (Hasb.) 339, 13 Pac. 351 (1886). That interpretation, of course, has been continued and is still authoritative. *Blackburn v. Portland Gold Mining Co.*, 175 U. S. 571; *Shoshone Mining Co. v. Rutter*, 177 U. S. 505, 506.

The following language of Mr. Justice Brewer in *Shoshone Mining Co. v. Rutter*, supra, 177 U. S. at 506, is appropriate here:

When in § 2326, Rev. Stat., Congress authorized that which is familiarly known in the mining regions

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24 \* \* \* It shall be the duty of the adverse claimant, within thirty days after filing his claims, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession \* \* \*

as an "adverse suit," it simply declared that the adverse claimant should commence proceedings "in a court of competent jurisdiction." It did not in express language prescribe either a Federal or a state court, and did not provide for exclusive or concurrent jurisdiction. If it had intended that the jurisdiction should be vested only in the Federal courts, it would undoubtedly have said so. If it had intended that any new rule of demarcation between the jurisdiction of the Federal and state courts should apply, it would likewise undoubtedly have said so. Leaving the matter as it did, it unquestionably meant that the competency of the court should be determined by rules theretofore prescribed in respect to the jurisdiction of the Federal courts. \* \* \*

This uniform and well-known construction of the statutory prototype of Section 80-11-11 furnishes strong additional support for our belief that in enacting Section 80-11-11 in 1896 the Utah legislature intended "any court of competent jurisdiction" to include both Federal and state courts.

3. Furthermore, Section 80-5-76, Appendix p. 1, which was enacted in 1937 and which expressly makes Section 80-11-11 applicable to suits for refund of occupation taxes paid under protest, reiterates the State's purpose to authorize suits in federal courts. The section first provides that, on direct review of any decision of the Tax Commission "no court of this state except the supreme court shall have jurisdiction." But, in sharp contrast, with respect to refund of occupation taxes paid under protest, the section provides that such a taxpayer may "thereafter bring an action in any court of competent jurisdiction as provided by Section 80-11-11."

If the majority below purported to find in this section support for its view that suits to recover occupation taxes

paid under protest must be in state courts (R. 142, 145, 146), we submit that it flagrantly misconstrued the section. Section 80-5-76 indicates a policy of *direct* review of the Tax Commission in the Utah Supreme Court, but by the sharply contrasting language of the proviso whereby authority is explicitly reserved to bring suit to recover taxes paid under protest in "*any* court of competent jurisdiction," it even more clearly emphasizes the long-standing policy of enabling such suits to be brought in either state or federal courts. The exception would not have been stated merely to authorize suits in the State's inferior courts when the legislature had already provided for complete review in the State's Supreme Court.

4. It should not be overlooked that the construction which we urge is the normal, literal construction, and that the construction for which respondents argue requires the interpolation of a limiting adjective which was not added by the legislature. "Any" is a broad word—the broadest possible word—equivalent to, and with the force of, every, or each one of all. *Hopkins v. Sanders*, 172 Mich. 227, 137 N. W. 709, 713; *Roedler v. Vandalia Bus Lines, Inc.*, 281 Ill. App. 520, 523; *Heyler v. City of Watertown*, 16 S. D. 25, 91 N. W. 334; *People v. Van Cleave*, 187 Ill. 125, 58 N. E. 422, 425; *Bouvier Law Dictionary* (3d ed.) Vol. I, p. 208. The word "any" is all comprehensive and unless limited by the context, includes all persons and things referred to indiscriminately. *Orme v. Atlas Gas & Oil Co.*, ..... Minn. ...., 13 N. W. 2d 757, 763; *Stout v. Simpson*, 34 Okla. 129, 124 P. 754, 756. In numerous statutes, the same phrase—"any court of competent jurisdiction"—where not limited by context, has been uniformly held to include both federal and state courts indis-

criminally, the facts otherwise essential to federal jurisdiction being present. Bankruptcy Act, Sec. 77(j), 11 U. S. C. Sec. 205(j); *In re Chicago & E. I. Ry. Co. Gourley v. Wham*, 121 F. (2d) 785 (C. C. A. 7th); Emergency Price Control Act of 1942, 50 U. S. C. App. Sec. 991, *et seq.*; *Regan v. Kroger Grocery & Baking Co.*, 386 Ill. 284, 54 N. E. (2d) 210; *Miller v. Municipal Court*, 22 Cal. (2d) 818, 142 P. (2d) 297; *Hall v. Chaltis*, 31 Atl. (2d) 699; Fair Labor Standards Act, 29 U. S. C. Sec. 201, *et seq.*; *Stringer v. Griffin Grocery Co.*, 149 S. W. (2d) 158; *Dennis v. Equitable Equipment Co.*, 7 So. (2d) 397 (La.); *Hargrave v. Mid-Continent Petroleum Corp.*, 36 F. Supp. 233; *Wingate v. General Auto Parts Co.*, 40 F. Supp. 364; *Booth v. Montgomery Ward & Co.*, 44 F. Supp. 451; *Donahue v. Susquehanna Collieries Co.*, 138 F. (2d) 3 (C. C. A. 3d); *Mengel v. Ishee*, 192 Miss. 366, 4 So. (2d) 878; Internal Revenue Act of July 13, 1866, Sec. 19; *The Collector v. Hubbard*, 12 Wall. 1, 14. See also *National Sash & Door Co., Inc., v. Continental Casualty Co.*, 37 F. (2d) 342 (C. C. A. 5th); *James Freeman Brown Co. v. Harris*, 139 F. 105 (C. C. A. 4th); *Robertson v. Railroad Labor Board*, 268 U. S. 619; *Finn v. Meighan*, .... U. S. ...., 89 L. ed., Vol. 15, Adv. Op. p 1086; and cases cited p. 12 supra.

5. Despite all of these considerations, the majority below apparently felt compelled to its result by the two recent decisions of this Court in *Great Northern Life Ins. Co. v. Read*, 322 U. S. 47, and *Ford Motor Co. v. Dept. of Treasury*, 323 U. S. 459. We submit that, on the contrary, Judge Phillips was correct in pointing out in his dissent that the two cases were clearly distinguishable, and that the majority opinion completely misconstrued their purport. Under the majority decision below, nothing but an express mention of the Federal courts



in the statute would suffice. That is clearly not the rule stemming from the facts in these two cases, nor is it the rule which prevails in the correlative situation involving the waiver of the immunity of the United States to suits in State courts. In *Minnesota v. United States*, 305 U. S. 382, 389-390, Mr. Justice Brandeis stated: "The United States argues that a statute granting permission to sue the United States must be construed to apply only to Federal courts unless there is an explicit reference to the state tribunals. \* \* \* This is not universally true even as to suits against the United States. \* \* \*"

In both the *Great Northern Life Ins. Co.* and the *Ford Motor Co.* cases there were factors, not present here, which indicated an intention to restrict the limits of the State's waiver of immunity to its own courts. In the former case, the Oklahoma statute (Session Laws, 1915, Ch. 107) by Article 1, Subdivision B, Section 1, provides that appeals taken from all boards of equalization "shall have precedence in the court to which they are taken." Section 2 provides a proceeding before the county board of equalization upon a complaint in writing and evidence adduced upon issues so proved—

\* \* \* and the stenographer of the County Court is directed, at the request of the Board or taxpayer, to take shorthand notes of such testimony and to transcribe such complaint and evidence, and a full transcript of the actions of the Board thereon and file the same with his certificate as to his accuracy in the district court, the filing of which transcript shall complete said appeal which shall, in due course, be examined and reviewed by said court and affirmed, modified or annulled as justice shall demand. \* \* \*

Section 3 prescribes a similar proceeding before the State Board of Equalization. Section 4 provides that the appellate

court "shall presume in favor of said Board any facts, circumstances or information of general knowledge in the particular business whose property was assessed by it." Section 5 adds that "the remedies of resort to the Boards and appeal therefrom shall be the sole remedies for the correction of assessment or equalization." Such prescribed and exclusive procedures cannot be reconciled with the conduct of a suit in a Federal court. As this Court itself noted in the *Great Northern Life Ins. Co.* case (322 U. S. at page 55):

Furthermore, § 12665 gives directions to the Oklahoma officer as to his obligations, requires the court to give precedence to these cases and directs the kind of a judgment to be returned \* \* \* which is quite different in language, if not in effect, from the judgment a federal court would render.

Similar considerations prevail with respect to the *Ford Motor Co.* case. The Indiana statute there involved (Section 64-2614(a), Burns, Indiana Stat. Ann. (1943 Replacement) provided:

\* \* \* Any person improperly charged with any tax provided for under the terms of this act, and required to pay the same, may recover any amount thus improperly collected, together with interest, in any proper action or suit against the department in any court of competent jurisdiction; and the circuit or superior court of the county in which the taxpayer resides or is located shall have original jurisdiction of action to recover any amount improperly collected.

This Court itself stressed the importance of that language, in stating (323 U. S. at pp. 465-466):

The provision in this section which vests original jurisdiction of suits for refund in the "circuit or superior court of the county in which the taxpayer resides or is located" indicates that the state legislature contemplated suits in the state courts.

6. Moreover, there are two considerations enunciated in these two recent cases which were overlooked by the majority below. In the *Great Northern Life Ins. Co.* case the court cited the following language from *Gunter v. Atlantic Coast Line*, 200 U. S. 273, dealing with a similar problem (see 322 U. S. at p. 47):

If there were doubt \* \* \* that doubt is entirely dispelled by a consideration of the contemporaneous interpretation given to the act by the officials charged with its execution, \* \* \* and by the action as well as non-action which followed the decision of that case by the state government in all its departments through a long period of years.

And the Court added (*ibid.*):

The administrative construction by a state of these statutes of consent have influence in determining our conclusions.

Here, as we have already pointed out in part 1 of this Point, there has been a very long-standing and well-recognized judicial and administrative construction of Section 80-11-11, directly contrary to the construction which it was accorded by the majority below.

The other factor which the majority below ignored is the contrast between the general policy of the State of Indiana and of the State of Utah. In Indiana, as the Court pointed out in the *Ford Motor Co.* case, the policy was against Federal court litigation (323 U. S. at p. 466):

Moreover, this interpretation of § 64-2614(a) to authorize suits only in state courts accords with the state legislature's policy. Indiana has adopted a liberal policy toward general contract claimants but confines their suits against the state to state courts.

In Utah, the legislative policy is quite the contrary. As recently as 1939, the State enacted Section 104-3-27, by

which it consented to be sued "in any court of this state or of the United States"—

• • • for the recovery of any property real or personal or for the possession thereof or to quiet title threats, or to foreclose mortgages or other liens thereon or to determine any adverse claim thereof, or secure an adjudication touching any mortgage or other lien the State of Utah may have or claim on the property involved.

In summary, as Judge Phillips stated in his dissent (R. 151):

In the instant case, neither the context of the statute nor the public policy of the state of Utah indicates that the phrase "in any court of competent jurisdiction" should be restricted to state courts.

We respectfully submit, therefore, that the decision of the court below should be reversed on this ground alone.

## II

### Point

**Respondent State Tax Commission is a distinct entity separate and apart from the State of Utah, is a citizen of Utah, and diversity of citizenship exists.**

Respondent State Tax Commission is an entity created by the Constitution of Utah to administer and supervise the tax laws of the state. (Art. XIII, Sec. 11, Constitution of Utah.) It is endowed with power to sue and be sued in its own name, this without qualification or limitation (Utah Code Ann. 1943, §80-5-46), is endowed with power to employ such agents, attorneys and others as may be necessary to perform the Commission's duties (§80-5-41), and they hold office during the pleasure of the Commission (§80-5-42). The Commission is empowered to prescribe rules and regulations for its own government and the transaction of its business

(§80-5-46), to establish throughout the state such branch offices as it may deem necessary (§80-5-42), and to have and use an official seal, filing an impression and description thereof with the Secretary of State. It is a completely autonomous body. The legislature may implement, but may not detract from its constitutional powers. Within the realm of its constituted authority, the State Tax Commission is supreme. The Commission possesses every corporate power that in the nature of things it will ever have occasion to exercise.

The State Tax Commission was the collecting officer within the provisions of §80-11-11 and is sued as a distinct entity separate and apart from the State of Utah and as a citizen of the State of Utah. The remaining defendants are the individuals who constitute the State Tax Commission and they are sued as citizens of the State of Utah. It is so alleged in the complaints. (R. 2-3, 117-118) The cause of action pleaded lies against the State Tax Commission and the individuals constituting it, and it is alleged that they and all of them made the levy complained of and in so doing acted beyond their power or authority. Judgment is prayed "against the defendant State Tax Commission and the other defendants" (R. 2-9, 123-124), and judgments were so rendered. (R. 26, 137) It is the position of petitioners that these suits against the State Tax Commission and the individuals comprising it for the amount of this unlawful and unauthorized tax paid under protest, are not suits against the State of Utah and that the federal court has jurisdiction on the basis of diversity alone.

Petitioners would seem to be squarely within the rule laid down by this court in *Thomas v. Ohio State University*

*Trustees*, 195 U. S. 207, 49 L. Ed. 160. That suit was one to partition certain lands alleged to be held adversely by the Board of Trustees. Jurisdiction was wholly dependent upon diversity of citizenship. The Board of Trustees of the Ohio State University was defined by the pleadings as "created as a collective body by the laws of that state, with power to sue and be sued by the name of the Board of Trustees of the Ohio State University." The Supreme Court of Ohio had adjudged the Board to be "an agency to manage and control a state institution as the State may direct or provide." The case came to this court on a certificate from the Circuit Court of Appeals for the Sixth Circuit, presenting certain questions, among which was the following:

"If the said Board of Trustees be not \* \* \* a corporation \* \* \*, may this suit be maintained against it as 'the Board of Trustees of the Ohio State University' without bringing the persons constituting the Board before the court as defendants?"

This court answered the question as follows, Mr. Justice Harlan writing the opinion:

\* \* \* as the board was entitled to sue and be sued by their collective name, and would be bound by any judgment rendered against it in that name, the jurisdiction of the circuit court would have sufficiently appeared, so far as the pleadings were concerned, without bringing the several persons constituting the board before the court as defendants, provided the bill had contained the additional allegation that each individual trustee was a citizen of Ohio. \* \* \*

*Pennoyer, et al., v. McConnaughy*, 140 U. S. 1, 35 L. ed. 362:

This was a suit instituted against the defendants, who comprised the Board of Land Commissioners of the State



of Oregon. It was contended that the suit was one against the State of Oregon forbidden by the Eleventh Amendment. This court held that the suit was of the class—

\* \* \* where a suit is brought against defendants who, claiming to act as officers of the State, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State. \* \* \*

and continued:

\* \* \* Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the State, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain legal duty, purely ministerial, is not within the meaning of the Eleventh Amendment an action against the State. \* \* \*

The court commented that the suit was against those individuals who collectively constituted the Board of Land Commissioners. The suits at bar are likewise against those individuals who collectively constitute the State Tax Commission, and they are sued not only individually but in their collective name, the State Tax Commission, which is empowered by statute to sue and be sued in that name in any court of competent jurisdiction in actions of the class to which these at bar belong. And it is here charged that these individuals, both as individuals and in their collective name, the State Tax Commission, have acted in excess of their authority and that their act is therefore not that of the State.



The classical statement of the law upon this subject in *Poindexter v. Greenhow*, 114 U. S. 270, at 288, will bear repetition here as follows:

The *ratio decidendi* in this class of cases is very plain. A defendant sued as a wrongdoer, who seeks to substitute the State in his place, or to justify by the authority of the State, or to defend on the ground that the State has adopted his act and exonerated him, cannot rest on the bare assertion of his defense. He is bound to establish it. The State is a political corporate body, can act only through agents, and can command only by laws. It is necessary, therefore, for such a defendant, in order to complete his defense, to produce a law of the State which constitutes his commission as its agent, and a warrant for his act. This the defendant, in the present case, undertook to do. He relied on the act of January 26, 1882, requiring him to collect taxes in gold, silver, United States treasury notes, national bank currency, and nothing else, and thus forbidding his receipt of coupons in lieu of money. That, it is true, is a legislative act of the government of Virginia, but it is not a law of the State of Virginia. The State has passed no such law, for it cannot; and what it cannot do, it certainly, in contemplation of law, has not done. The Constitution of the United States, and its own contract, both irrepealable by any act on its part, are the law of Virginia; and that law made it the duty of the defendant to receive the coupons tendered in payment of taxes, and declared every step to enforce the tax, thereafter taken, to be without warrant of law, and therefore a wrong. He stands, then, stripped of his official character; and, confessing a personal violation of the plaintiff's rights for which he must personally answer, he is without defense.

The court below recognized that principle in *United States v. Board of Commissioners of Grady County, Oklahoma*, et al., 54 F. (2d) 593.

Moreover, §80-11-11 authorizes suit for the recovery of taxes paid under protest "against the officer to whom said tax \* \* \* was paid, or against the state, county, municipality, or other taxing unit on whose behalf the same was collected." The suits at bar were instituted against the officer to whom the taxes were paid, not against the state, county or other taxing unit, on whose behalf the same were collected. The State Tax Commission was the officer to whom the tax was paid. The statute itself makes the distinction between the officer receiving payment of the tax and the state or other taxing unit on whose behalf the collection was made, and which might have been sued instead of the State Tax Commission had these petitioners so elected. Within the contemplation of the statute itself, the officer making the collection is an entity separate and apart from the state or other unit for which the collection was made. The officer here involved, the State Tax Commission, was by statute endowed with power to sue and be sued in its own name in any court of competent jurisdiction. Suit can be maintained only by legal entities, persons, corporations or quasi corporations. Upon this subject attention is directed to the following:

Parks, et al., v. Carriere Consol. School Dist. (C.C.A. 5th), 12 F. (2d) 37, as follows:

If a school district is authorized by the legislation creating it, as construed by the courts, to contract and sue in its own name, then it is a body corporate, or a quasi corporate body, and as such a citizen of the state under which it is organized, within the purview of the Removal Act. This is true, though it may also be protected from suit by statute or court decision. A mere bureau or department of a state government cannot sue in its own name, or be a plaintiff. Conferring on a school district capacity to contract and

sue in its own name, of itself, makes of it more than a mere governmental bureau. The authority to institute suits in its own name subjects it to the burdens of a suitor, including those arising under the Removal Act. Suits can be maintained only by legal entities—persons, corporations, or quasi corporations. The legislation that is sufficient to empower a school district to sue in its own name makes of it a legal entity, and a citizen within the meaning of the Removal Act. In this case the state of Mississippi is not a party plaintiff on the record.

State of Missouri v. Homesteaders Life Assn., No. 10850, (C.C.A. 8th, May 27, 1937—Rehearing Denied June 21, 1937, Cert. Denied, 302 U. S. 717), 90 F. 2d 543, as follows:

In *State Highway Commission v. Kansas City Bridge Company*, 81 F. (2d) 689, we point out the distinction between the case of *Louisiana Highway Commission v. Farnsworth*, *supra*, and *State Highway Commission v. Utah Construction Co.*, *supra*. In the *Utah Construction Company Case*, the State Highway Commission was not authorized to sue nor be sued. So, in *State Highway Commission v. Kansas City Bridge Company*, *supra*, the State Highway Commission could not sue nor be sued. In commenting upon the distinction between these cases we said: "We think that the true distinction between the case of *Louisiana Highway Commission v. Farnsworth*, *supra*, and *State Highway Commission of Wyoming v. Utah Construction Co.*, *supra*, is that in the former the federal court had jurisdiction not because the state Supreme Court had held that the commission was a legal entity distinct from the state and subject to suit, but because, under the constitution and laws of Louisiana, it was such a legal entity and a citizen of Louisiana—while in the latter case the highway commission of Wyoming was a mere representative of the state."

Under the Missouri laws, the Superintendent of the Insurance Department is, we think, an entity distinct from the state with power to sue and be sued. The state in the instant action has not made itself "an

active agent," and has not "assumed responsibilities." \* \* \*

The state has divorced itself from the litigation which the Superintendent of the Insurance Department may conduct. Its position is comparable to that of the beneficiary of an express trust whose citizenship has no bearing on the jurisdiction of a federal court, the court not looking beyond the citizenship of the trustee who is the party litigant. \* \* \* The mere fact that the state has a beneficial interest in the ultimate recovery does not make it a party. \* \* \*

*Bromwell Brush & Wire Goods Co. v. State Board of Charities and Corrections* (District Court, E. D. Kentucky, September 24, 1921, Affirmed 288 F. 1018; Cert. denied, 262 U. S. 753), 279 F. 440:

\* \* \* In neither act is it provided in so many words that the board thereby created is to be a corporation. Notwithstanding such is the case, the former board was, and the defendant board is, a corporation, or at least a quasi corporation. \* \* \*

\* \* \* the State Board of Control, as long as it was in existence, had, and the defendant board, since its creation, has the power to sue and to be sued. Such is an inseparable incident of being a corporate entity. \* \* \*

\* \* \*

\* \* \* a suit against a state officer or a state agency, in which relief is sought solely against the officer or agency, and a good cause of action against him or it is stated, is always maintainable, no matter how much the state will be affected by the granting of such relief. Such a suit is not a suit against the state.

*Hunkin-Conkey Construction Co. v. Pennsylvania T. Commission* (D. C. M. D. Pa.), 34 F. Supp. 26:

The sole basis of jurisdiction was diversity of citizenship. It was contended that the Commission was but the agent of the State and that the State was the real party defendant and therefore the suit was barred by the Eleventh Amendment; that if not so barred, the court was without jurisdiction because diversity did not exist. The court held:

\* \* \* In this case, the Commission is authorized to sue and be sued. This general provision constitutes a waiver by the State, if the State is the real party in interest, of its immunity from suit. \* \* \* However, as shall be shown later, it is my conclusion that the State is not the real party defendant.

\* \* \* \* \*

The fact that the Commission is not a corporation does not make it any less a distinct legal entity. It is an unincorporated association, sometimes called a quasi corporation, with power to sue and be sued in its own name, and as such it assumes the citizenship of its members. *Thomas v. Board of Trustees*, 195 U. S. 207, 25 S. Ct. 24, 49 L. Ed. 160. In the present case, the members of the Commission are alleged to be citizens of the Commonwealth of Pennsylvania and, therefore, this Commission must be deemed to be a citizen of Pennsylvania within the meaning of 28 U.S.C.A. §41 (1).

\* \* \* \* \*

*Louisiana Highway Commission v. Farnsworth*, 74 F. (2d) 910; certiorari denied, 294 U. S. 729, 79 L. Ed. 1259, 55 S. Ct. 638.

The Fifth Circuit deemed itself bound by the decision of the Supreme Court of Louisiana in *Saint v. Allen*, 172 La. 350, 134 So. 246, from the opinion in which case the court quoted in part as follows:

“The commission, in our opinion, is a distinct legal entity from the state. Section 3 of Act. No. 95

of 1921 (Ex. Sess.) makes it a body corporate, with power as such to sue and be sued. It is an agency of the state, and not the state itself, created for the purpose of executing certain duties, devolving primarily upon the state. \* \* \*

\* \* \* it may be said that the ruling, as to the separate existence of the commission, is not well taken here, because the act, creating it, provides that all contracts for highway improvement shall be made in the name of the state, and that the state, acting through the commission, may acquire gravel beds, and the like, by purchase, lease, or donation, and that the state provides the commission with funds with which to discharge the purposes of its creation. Sections 16, 23, 34, Act. No. 95 of 1921 (Ex. Sess.). These facts, however, are insufficient to make the commission and the state one and the same. They merely show that the commission is an agency of the state. It does not even follow that, because contracts for highway improvements must be entered into in the name of the state, suits on such contracts should be brought by the state or against it, for the commission, as a body corporate, is given express power to sue and be sued, which shows that such suits should be instituted by the commission, and not by the state.

*State Life Insurance Co. v. Daniel* (D. C. W. D. Texas),  
6 F. Supp. 1015:

The defendant Daniel was Commissioner of Insurance of the State of Texas. He was sued to recover an occupation tax paid under protest, the amount of which was being held in a "suspense account" provided for by the laws of Texas, awaiting determination of the title thereto as provided by the suspense statute. It was contended that the suit was one against the State of Texas and that there was no diversity. The statute provided for suit in any court of competent jurisdiction in Travis County, Texas, the statute making no provi-

sion as to whether the court should be state or federal. The court overruled the plea to the jurisdiction, saying in part:

In arriving at this conclusion the court has not overlooked the case of *Smith v. Reeves*, 178 U. S. 436, 20 S. Ct. 919, 920, 44 L. Ed. 1140, much relied on by defendants. That case, while similar in its subject-matter to the one at bar, is easily distinguished. There a California suspense statute was under consideration, and there the money exacted was at once paid into the state treasury and treated as the property of the state. It was mingled with other moneys owned by the state and claimed by the state, and the court, in passing upon the matter, held that despite the fact that the action was against a state official, the state was in truth and in fact the party at interest. However, in determining this point, the court makes this very significant statement:

"This case is unlike those in which we have held that a suit would lie by one person against another person to recover possession of specific property, although the latter claimed that he was in possession as an officer of the state and not otherwise. In such a case, the settled doctrine of this court is that the question of possession does not cease to be a judicial question—as between the parties actually before the court—because the defendant asserts or suggests that the right of possession is in the state of which he is an officer or agent. *Tindal v. Wesley*, 167 U. S. 204, 221, 17 S. Ct. 770, 42 L. Ed. 137, 143, and authorities there cited. \* \* \*

This statement by the court applies peculiarly to the Texas statute. Sections 3 and 4 of article 7057b evidence clearly the legislative intention that money paid by the taxpayer under protest shall be segregated and held as a fund apart until the title to it is determined. \* \* \*

It is perfectly apparent in the light of the history of the statute and its wording that the present action is one to recover specific money, impounded by statute



in the hands of state officers, alleged to have been illegally exacted, and which has not been commingled with the funds of the state and to which the state does not assert title other than as limited by the provisions of the suspense statute.

The suspense statute in Texas was substantially the same as that of Utah. §80-11-13, Utah Code 1943.

The opinion of the court by Mr. Justice Harlan in *Tindal v. Wesley*, 167 U. S. 204, 221, 17 S. Ct. 770, 42 L. ed. 137, is an exhaustive discussion of principles which in our opinion should rule the suits at bar. The court held:

\* \* \* If a suit against officers of a state to enjoin them from enforcing an unconstitutional statute, whereby the plaintiff's property will be injured, or to recover damages for taking under a void statute the property of the citizen, be not one against the state, it is impossible to see how a suit against the same individuals to recover the possession of property belonging to the plaintiff and illegally withheld by the defendants can be deemed a suit against the state. Any other view leads to this result: That if a state, by its officers, acting under a void statute, should seize for public use the property of a citizen, without making or securing just compensation for him, and thus violate the constitutional provision, declaring that no state shall deprive any person of property without due process of law (*Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 236, 241 (41: 979), the citizen is remediless so long as the state, by its agents, chooses to hold his property; for, according to the contention of the defendants, if such agents are sued as individuals, wrongfully in possession, they can bring about the dismissal of the suit by simply informing the court of the official character in which they hold the property thus illegally appropriated. \* \* \*

We are of opinion that this suit is not one against the state within the meaning of the 11th Amendment.

The Utah statute proceeds as upon the theory of a suit against the taxing officer, here the state Tax Commission, for property illegally appropriated, providing by §80-11-13 that taxes paid under protest—

\* \* \* shall not be covered into the general fund, but shall be held and retained by the state treasurer and shall not be expended until the time for the filing of an action for the recovery of said tax or license shall have expired, and in case an action has been filed, until it shall have been finally determined that said tax or license was lawfully or was unlawfully collected. If in any such action it shall be finally determined that said tax or license was unlawfully collected, the officer collecting said tax or license shall forthwith approve a claim for the amount of said tax or license adjudged to have been unlawfully collected, together with costs and interest as provided by law, and any excess amount in excess of said tax required to pay said claim, including interest and costs, shall be repaid out of any unappropriated funds in the hands of the state treasurer, or, in case it is necessary, a deficit for said amount shall be authorized,

thus withholding from the state and setting aside the amount of the tax paid, to bide the outcome of the litigation of the several claims to that fund. And were these suits actions against the state itself to recover such fund, the Utah legislature has provided by §104-3-27, Utah Code Annotated 1943, that—

\* \* \* the consent of the state of Utah is given to be named a party in any suit which is now pending or which may hereafter be brought in any court of this state or of the United States for the recovery of any property real or personal or for the possession thereof \* \* \*

The Supreme Court of the State of Utah discussed this question in *State v. District Court of Salt Lake County*, 102

Utah 284, 115 P. (2d) 913, opinion on rehearing 102 Utah 290, 128 P. (2d) 471. That suit was one against the State of Utah, as distinguished from the State Tax Commission, to recover taxes paid under protest under an unconstitutional statute. The question was how service could be obtained on the State, whether the summons served upon the Governor and the Attorney General was sufficient to give the District Court jurisdiction over the State of Utah as defendant. The court first held that while it was evident that by §80-11-11 the State of Utah had consented to be sued, the law provided no method whereby service could be had on the State, this in contrast to the procedure in actions against the tax collecting officer, or State Tax Commission, the manner of service upon which was expressly provided. In his concurring opinion, Mr. Justice Larson said:

\* \* \* the statute requiring that taxes collected by state officers or boards, and paid under protest, be not covered into the state funds, but are sequestered and retained by the Treasurer as separate moneys in his hands pending determination as to whether it belongs to the state or to the taxpayer. The state not having received the money is not subject to suit for repayment thereof. Such action must lie against the person who received or who has the possession and control of the property. Pending determination as to whom the money belongs, the state has no more claim to or control over the money than the taxpayer. The action, therefore, should lie against the party who has the money. *Such party is not the state under the provisions of the statute. (Italics supplied.)*

Upon rehearing the majority held that by analogy service of the summons upon the Governor and the Attorney General was sufficient. In the then concurring opinion of Judge Leverich, it is said:

Section 80-11-11, Revised Statutes of Utah 1933, provides that the party bringing the action may sue the state, county or municipality, or he may bring the action against the officer to whom the tax was paid. In the former opinion in this case it was concluded that Section 80-11-13 modified Section 80-11-11, to the extent that when action is brought to recover taxes paid to the state, the tax collecting officer of the state and not the state must be the party against whom the action is brought. This interpretation is not justified by the language contained in Section 80-11-13. To reach that conclusion would require reading into this section (80-11-13) much that is not there. This should be done by the legislature and not by the court.

The statute speaks in the alternative; the taxpayer may sue *either* the state *or* the collecting officer, here the State Tax Commission. For purposes of suit the State and the collecting officer are individual and separate entities. As expressed by Mr. Justice Harlan in *Thomas v. Ohio State University Trustees*, *supra*, as the Commission "was entitled to sue and be sued by their collective name, and would be bound by any judgment rendered against it in that name, the jurisdiction of the circuit (district) court" sufficiently appeared by alleging the citizenship of each member of the Commission.

That the State of Utah has waived its immunity to suit in the federal courts, we submit, is clear, and that waiver, coupled with the federal question here present, establishes the jurisdiction of the courts below in the suits at bar; but we submit it is also clear that the Utah legislature had no intention of confining the jurisdiction of the federal courts, in suits under these statutes, to those suits only wherein a federal question shall be present. The general and unquali-

fied consent, waiver and authority here appearing, manifest a legislative intent to permit access to the federal and state courts indiscriminately, regardless of the existence of a federal question, to the end that otherwise qualified litigants shall have available to them, as they have had in the past, unobstructed recourse to the federal courts. The collecting officer, who by the very statute itself is constituted an entity separate and apart from the state for purpose of suit in any court of competent jurisdiction, is capable of acquiring citizenship for purpose of federal jurisdiction.

### III Point

**The court below plainly misconstrued Utah law in holding that the present actions could not be maintained against the individual commissioners.**

The majority of the court below has held, not only that these suits cannot be maintained in the Federal court against the collecting officer, the State Tax Commission, because the Commission for this purpose in its opinion was the State of Utah, but also that they cannot be maintained in the Federal court against the individual defendants, who are charged with unlawful and unauthorized exaction of funds. We believe that in this respect, too, the majority erred, since the rule in Utah is plainly to the contrary.<sup>3</sup>

The complaints name the individual members of the Commission as defendants. (R. 1, 116) Yet the majority below reasoned that the impact of a judgment against them would be felt by the State; that consequently the State was

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<sup>3</sup> The dissenting judge, having concluded that plaintiffs were entitled to recover upon the basis urged in Point I, *supra*, did not discuss this point in his opinion.

the real party in interest; and that consequently plaintiffs stood no better in this aspect of the case than they did as respects the suit against the State itself.

The Utah courts, on the contrary, distinguish between a suit against a state commission, and a suit against individuals who constitute such a commission. In *State, by State Road Commission, et al., v. District Court, Fourth Judicial District*, 94 Utah 384 78 P. (2d) 502 (1938), the Supreme Court of Utah held that a suit, insofar as it was brought against the Road Commission, an agency of the State, was against the State itself and that the State had not given its consent.\* It then considered the possibility of obtaining relief against the *individual members* of the Road Commission, though recognizing (94 Utah at 390, 78 P. (2d) at 505) that the effect of relief against the individuals "will be to coerce the State into paying \* \* \* damages, or permanently prevent the State from carrying out the proposed highway improvement." The court posed the question (94 Utah at 392, 78 P. (2d) at 506): "Can the members of the Road Commission, if sued as individuals, avoid the injunction by asserting that they are acting as an agency of the State and the State cannot be sued?" It concluded that the suit against the individual members was an entirely different matter. "It must not be said that any officer of the State is not amenable to the process of the courts for violation of the law. The

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\*The State Road Commission may be sued only on written contracts made by it and may settle only those claims arising out of its negligence that are not in excess of \$250.00. Utah Code Ann. 1943, §36-2-1. It is not an autonomous body; it is but one of the agencies of the state operating under the authority of the engineering commission. Utah Code Ann. 1943, §82C-1-2 and 12.



immunity of the State from suit cannot be successfully invoked by any official, high or low, to prevent the courts from enjoining an act forbidden by law." (94 Utah at 405, 78 P. (2d) at 511) The same doctrine has found frequent recognition in this and other Federal courts. *Worcester Transit Co. v. Riley*, 302 U. S. 292; *Greene v. Louisville & I. R. R. Co.*, 244 U. S. 499; *Atchison T. & S. F. Ry. Co. v. O'Connor*, 229 U. S. 280; *Hopkins v. Clemson Agricultural College*, 221 F. S. 636; *Ex parte Young*, 209 U. S. 123; *Poindexter v. Greenhow*, 114 U. S. 270; *State Board of Escheats of Michigan v. Klump*, 38 F. (2d) 625 (C.C.A. 6th); *State Life Ins. Co. v. Daniel*, 6 F. Supp. 1015 (D. C. W. D. Tex.).

The majority below appear to have been misled by an erroneous interpretation of both the Utah statutes and the complaints themselves. As to the statutes, the opinion (see R. 160-161) seems to rest its conclusion that the State of Utah is the real party defendant upon a belief that if suit were successfully maintained against the individuals, the State would nevertheless be required to pay the amount of the judgment under Section 80-11-13 of the Code. That is a plain misinterpretation of that section; the State has no responsibility for the reimbursement of the defendants if they are held individually liable. Section 80-11-13<sup>3</sup> simply

---

<sup>3</sup> The Section reads:

In case any tax or license shall be paid to the state under protest, said tax or license so paid shall not be covered into the general fund, but shall be held and retained by the state treasurer and shall not be expended until the time for the filing of an action for the recovery of said tax or license shall have expired, and in case an action has been filed, until it shall have been finally determined that said tax or license was lawfully or was unlawfully collected. If in any such action it shall be finally determined that said tax or license was



provides for the segregation of funds paid under protest, so that if the State be sued, as it may be under Section 80-11-11, such funds may, if necessary, be promptly repaid. There is no authority whatever in Section 80-11-13 for payment of a judgment obtained against an individual in a suit which is not bottomed on the statutory procedure outlined in Section 80-11-11.\*

The misinterpretation of the complaints is, we submit, equally apparent. The majority opinion states (R. 143) that petitioners must have intended to sue the State, since their complaints allege that the funds were paid under protest, and that the payments had not been covered into the general funds of the State, but were being retained as required by law. The opinion then added: (R. 143)

If these were suits against the individual members of the Commission for a personal judgment, these allegations would be surplusage and immaterial to the issue.

That conclusion is wholly unwarranted. Petitioners had every reason to believe, and still believe, that a suit against the State Tax Commission, the first-named defendant, would

unlawfully collected, the officer collecting said tax or license shall forthwith approve a claim for the amount of said tax or license adjudged to have been unlawfully collected, together with costs and interest as provided by law, and any excess amount in excess of said tax required to pay said claim, including interest and costs, shall be repaid out of any unappropriated funds in the hands of the state treasurer, or, in case it is necessary, a deficit for said amount shall be authorized.

\* That the legislature of the State of Utah might later determine, as a matter of legislative policy, to reimburse the individuals who were thus held liable, of course, does not make the action a suit against the State.

be within the jurisdiction of the Federal courts, and the allegations relating to Sections 80-11-11 and 80-11-13 were highly relevant as against that defendant. On the other hand, the petitioners had also every reason to believe that they could add a second string to their bow by suing the individuals, under the *State Road Commission* case, *supra*. The complaint was simply drawn to comply with all of its requirements for suit against all of the parties defendant. The District Court, in fact, entered judgments against all parties (R. 26, 137)—though, of course, petitioners would not have been entitled to more than one satisfaction of their judgments.

Consideration of the complaints illustrate further their dual nature. Although were the action to be construed as one against the State of Utah, jurisdiction was well founded on the existence of a federal question; as against each the *State Tax Commission* and the individual defendants, the complaints added a second line of jurisdiction—irrelevant to suits against the State—namely, diversity of citizenship. (R. 1, 116) Again, it is beyond dispute that the *State Tax Commission* may be sued without joining the individual members; indeed, that is the customary form of such a complaint. See, *e. g.*, *Peterson v. State Tax Commission*, 106 Utah 337, 148 P. (2d) 340; *Ford J. Twaits Co. v. State Tax Commission*, 106 Utah 343, 148 P. (2d) 343; *Intermountain Title Guaranty Co. v. State Tax Commission*, ..... Utah ....., 152 P. (2d) 724; *W. M. & M. S. Broening Co. v. State Tax Commission*, ..... Utah ....., 154 P. (2d) 993. Had no relief been sought against them as individuals in the instant cases, the usual form would have been used. Finally, it should be noted that the complaints allege (R. 10, 124),

that "said seizure by said defendants was, and is, wholly without authority from the State of Utah or otherwise or at all, wholly in excess of the power of said defendants, or any of them \* \* \*"

We submit, therefore, that the decision below was also in error in refusing the jurisdiction based upon the individual liability of the respondents—a liability which is clearly imposed by Utah law.

### CONCLUSION

Wherefore, we submit that the decision below should be reversed, and the causes remanded to the court below with directions to hear and dispose of them on the merits.

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## APPENDIX

Utah Code Annotated 1943:

80-5-66.

\* \* \* every person engaged in the business of mining or producing ore containing gold, silver, copper lead, iron, zinc or other valuable metal in this state shall pay to the state of Utah an occupation tax equal to one per cent of the gross amount received for or the gross value of metalliferous ore sold which tax shall be in addition to all other taxes provided by law.

The basis for computing the occupation tax imposed by this act for any year shall be as follows:

(a) If the ore or metals extracted is sold under a bona fide contract of sale the amount of money or its equivalent actually received by the owner, lessee, contractor or other person operating the mine or mining claim from the sale of all ores or metals during the calendar year \* \* \*

80-5-81.

All occupation taxes imposed and collected under this act shall be paid to the state tax commission, and by it promptly paid over to the state treasurer, and by him credited to the state general fund.

80-5-76.

No court of this state except the supreme court shall have jurisdiction to review, alter, or annul any decision of the tax commission or to suspend or delay the operation or execution thereof: *provided*, any taxpayer may pay his occupation tax under protest and thereafter bring an action in any court of competent jurisdiction for the return thereof as provided by section 80-11-11, Revised Statutes of Utah, 1933.

## 80-11-11.

In all cases of levy of taxes, licenses, or other demands for public revenue which is deemed unlawful by the party whose property is thus taxed, or upon whom such tax or license is demanded or enforced, such party may pay under protest such tax or license or any part thereof deemed unlawful, to the officers designated and authorized by law to collect the same and thereupon the party so paying or his legal representative may bring an action in any court of competent jurisdiction against the officer to whom said tax or license was paid, or against the state, county, municipality or other taxing unit on whose behalf the same was collected, to recover said tax or license or any portion thereof paid under protest.

## 80-11-13.

In case any tax or license shall be paid to the state under protest, said tax or license so paid shall not be covered into the general fund but shall be held and retained by the state treasurer and shall not be expended until the time for the filing of an action for the recovery of said tax or license shall have expired, and in case an action has been filed, until it shall have been finally determined that said tax or license was lawfully or was unlawfully collected. If in any such action it shall be finally determined that said tax or license was unlawfully collected, the officer collecting said tax or license shall forthwith approve a claim for the amount of said tax or license adjudged to have been unlawfully collected, together with costs and interest as provided by law, and any excess amount in excess of said tax required to pay said claim, including interest and costs, shall be repaid out of any unappropriated funds in the hands of the state treasurer, or, in case it is necessary, a deficit for said amount shall be authorized.

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CHARLES ELMORE DISNEY

**Nos. 424 and 425**

**IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1945**

**No. 424**

**KENNECOTT COPPER CORPORATION, A CORPORATION,**  
*Petitioner,*

*vs.*

**STATE TAX COMMISSION; AND J. LAMBERT  
GIBSON, ROSCOE E. HAMMOND, MILTON  
TWITCHELL, AND HEBER BENNION, JR., CONSTI-  
TUTING SAID STATE TAX COMMISSION,**  
*Respondents.*

**No. 425**

**SILVER KING COALITION MINES COMPANY, A  
CORPORATION,**  
*Petitioner,*

*vs.*

**STATE TAX COMMISSION; AND J. LAMBERT  
GIBSON, ROSCOE E. HAMMOND, MILTON  
TWITCHELL, AND HEBER BENNION, JR., CONSTI-  
TUTING SAID STATE TAX COMMISSION,**  
*Respondents.*

**ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE TENTH CIRCUIT**

**BRIEF OF RESPONDENTS STATE TAX COMMISSION;  
AND J. LAMBERT GIBSON, ROSCOE E. HAMMOND  
MILTON TWITCHELL, AND HEBER BENNION,  
JR., constituting said STATE TAX COMMISSION**

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**IN THE  
SUPREME COURT OF THE UNITED STATES**

**October Term, 1945**

**KENNECOTT COPPER CORPORATION, A CORPORATION,**  
*Petitioner,*

*vs.*

**STATE TAX COMMISSION; AND J. LAMBERT  
GIBSON, ROSCOE E. HAMMOND, MILTON  
TWITCHELL, AND HEBER BENNION, JR., CONSTI-  
TUTING SAID STATE TAX COMMISSION,**  
*Respondents.*

**No. 425**

**SILVER KING COALITION MINES COMPANY, A  
CORPORATION,**  
*Petitioner,*

*vs.*

**STATE TAX COMMISSION; AND J. LAMBERT  
GIBSON, ROSCOE E. HAMMOND, MILTON  
TWITCHELL, AND HEBER BENNION, JR., CONSTI-  
TUTING SAID STATE TAX COMMISSION,**  
*Respondents.*

**No. 424**

**BRIEF OF RESPONDENTS STATE TAX COMMISSION;  
AND J. LAMBERT GIBSON, ROSCOE E. HAMMOND  
MILTON TWITCHELL, AND HEBER BENNION,  
JR., constituting said STATE TAX COMMISSION**

**STATEMENT**

The suits here involved were originally commenced in the Federal District Court for the District of Utah by petitioners to recover certain occupation taxes paid to the State Tax Commission of Utah under protest. Respondents appeared and filed a Motion to Dismiss upon the grounds, first, that the court had no jurisdiction for the reason that the

matter involved is not a controversy between citizens of different states in that the suits are, in fact, suits against the State of Utah, and, second, that the court had no jurisdiction over the Defendants for the reason that the State Tax Commission is an agency of the State of Utah and the individual defendants are sued in their representative capacities as members of such Commission. (R. 11, 125)

The District Court overruled respondent's motions. (R. 12, 126). Respondents thereupon filed answers and set up in each case an affirmative defense that the State Tax Commission is not a citizen of the State of Utah or of any state and further, that the individual respondents are sued only in a representative capacity, that the relief sought against them is only in their official capacity as representatives of the State of Utah which alone will be affected or compelled to pay any judgment which might be rendered and to whom alone will inure the benefits to accrue or result from any judgment in their favor; that the suits are barred by the provisions of the 11th Amendment to the Constitution of the United States. (R. 12, 13, 127)

The trial court found the issues in favor of petitioners herein and directed a verdict in their favor. Upon appeal, the judgment of the lower court was reversed on the ground that the suits were, in fact, suits against the State of Utah and the State of Utah has not consented to be sued in the federal courts. (R. 141, et seq.)

The cases are now before this court by way of Certiorari to review the decision of the Circuit Court of Appeals. (R. 152, 153). The sole question for determination is whether the



federal courts lack jurisdiction to entertain the suits here involved. The validity of the occupation tax levied upon petitioners herein and collected by the State Tax Commission is not involved in this controversy. For all intents and purposes, such levy was valid and legal. While it is true, as stated by petitioners, that certain monies received from the United States through Metals Reserve Company were included as a part of the "gross amount received for, or gross value of," the metalliferous ores mined and sold by the respective mining companies, such monies were paid by Metals Reserve Company pursuant to what is known as the "premium price plan" whereby the federal government, through Metals Reserve Company, guaranteed to the several mining companies "premium prices" for their ores produced over and above fixed quotas. (R. 48, 51, 54, 65, 94, 95, 97.)

### **Summary of Argument**

Respondents, in the argument hereinafter set forth, choose to follow the points raised and argued by petitioners relating to the question, first, whether the State of Utah has consented to be sued in the federal courts for the recovery of an occupation tax paid under protest—petitioners apparently conceding for the purposes of this argument that the suits here involved are, in fact, suits against the State of Utah; second, whether these suits are against the State Tax Commission as a legal entity separate and distinct from the state and a citizen of the State of Utah for the purposes of diversity of citizenship; and third, whether the individuals comprising the State Tax Commission are sued in their individual capacities.

### **Statutes Involved**

In addition to those referred to by petitioners, the following constitutional and statutory provisions are important to a proper analysis of the issues presented in these cases:

Section 80-5-67, Utah Code Annotated, 1943, whereby every person engaged in the business of mining or producing metalliferous ore is required to file with the State Tax Commission a statement containing certain information relative to the production of ore during the preceding year.

Section 80-5-68, setting forth the procedure to be followed by the Tax Commission in the event any person fails to file such statement required by Section 80-5-67.

Section 80-5-70, fixing the first day of June, next succeeding the calendar year when the ore or metal is sold, as the date when such tax shall become due and payable.

Section 80-5-72, requiring the State Tax Commission to fix the amount of the occupation tax that each person is required to pay on or before the first Monday in May of each year, and to give notice to the taxpayer accordingly.

Section 80-5-73, authorizing protest and hearing before the Tax Commission in the event any person feels aggrieved because of the amount of the occupation tax assessed against him.

Section 80-5-74, providing for the decision of the Tax Commission to be rendered after any hearing and making the same final unless proper proceedings are instituted to review the same.

Section 80-5-75, outlining procedure for review of the decision of the Tax Commission by the Supreme Court of the State of Utah by writ of certiorari or review.

Section 80-5-77, providing for certain conditions to be met by the taxpayer before making application to the Supreme Court for such a writ.

Section 80-5-78 and Section 80-5-79, outlining procedure to be followed by the State Tax Commission in enforcing payment of the occupation tax by warrant and execution.

Section 80-5-80, authorizing action by the State Tax Commission to enforce collection of the occupation tax "in any court of competent jurisdiction" at any time within six years after the cause shall have accrued.

Section 80-5-82, providing that if any part of the Occupation Tax Act should be adjudged invalid "by any court of competent jurisdiction" such judgment should not affect the balance of said act.

Eleventh Amendment to the Constitution of the United States, wherein it is provided that the judicial power of the United States shall not extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State.

The pertinent portions of the several statutory provisions referred to are set forth in the Appendix, infra, pages I to V.

## ARGUMENT

### I.

THE PROVISIONS OF THE UTAH STATUTES  
AUTHORIZING A SUIT "IN ANY COURT OF  
COMPETENT JURISDICTION" DO NOT  
WAIVE IMMUNITY BY THE STATE  
OF UTAH TO SUIT AGAINST IT IN  
IN THE FEDERAL COURTS.

This argument presupposes that the instant suits are, in fact, suits against the State of Utah. Otherwise, the question of whether the state has or has not consented to be sued in the federal courts and waived its immunity granted by the 11th Amendment of the Constitution of the United States would not be involved. Whether the state has consented to be sued and waived its immunity, insofar as federal courts are concerned, depends upon the construction to be given to the phrase "any court of competent jurisdiction" as used in the Utah statutes relating to suits to recover taxes paid under protest. Sections 80-5-76 and 80-11-11, Utah Code Annotated, 1943.

First, answering petitioners' argument to the effect that the State of Utah has waived its immunity from suit, we cannot agree that the phrase "in any court of competent jurisdiction" as used in Section 80-11-11, Utah Code Annotated, 1943, must be read "any *state* court of competent jurisdiction" to hold that the State of Utah has not waived such immunity. The general and ordinary interpretation given by the courts to the phrase "any court of competent juris-

diction" is that such phrase refers to those courts—whether they be state or federal—which would otherwise have jurisdiction of both the parties and the subject matter concerned. In the case of *In re Norton*, 64 Kansas 842, 68 P. 639, the court held:

"We suppose it will be conceded that a court of competent jurisdiction is one provided for in the constitution, or created by the legislature, and having jurisdiction of the subject matter and of the person. In *People v. Liscomb*, 3 Hun. 769, it was said that a 'competent tribunal' meant a 'tribunal having jurisdiction of the subject-matter and the person'; in *Babbitt v. Doe*, 4 Ind. 359, it is said that the terms 'competent jurisdiction' in their usual signification, embrace the person as well as the cause'; and in the notes to the *McLeod Case*, 3 Hill, 665, it was said that, 'if there was no legal power to render the judgment or decree or issue the process, there was no competent court, and consequently no judgment or process.'"

In the case of *Texas Employers Insurance Association vs. Numanaker*, (Texas Court of Civil Appeals) 267 S. W. 749, the court was concerned with an interpretation of the Texas statute providing that a party who did not wish to abide by the decision of the Industrial Accident Board might 'bring suit in some court of competent jurisdiction.' The court held that such phrase did not confer additional jurisdiction upon county courts. Unless such courts otherwise had jurisdiction of the matter and the parties they could not turn to the statute for power to hear and determine the matter. We quote from the court's opinion as follows:

"We think the legal effect of a suit to set aside an award of the Industrial Accident Board is to invoke the judgment of the court on the issue of the liability of the insurer, under the provisions of the act.

upon the facts alleged in the claim presented to said board, and to substitute the judgment of such court when rendered for the prior award of the board. Such being the case, a court of 'competent jurisdiction' within the meaning of the act, is one having jurisdiction under the Constitution and laws of this state to determine whether such liability exists, and if so, the amount thereof."

See also *Robinson v. Attapulgus Clay Company*, 55 Ga. App. 141, 189 S. E. 555, where the court made the following analysis:

"Jurisdiction itself is a term that is defined to be 'the power of hearing and determining causes and doing justice in matters of complaint.' *Wright v. State*, 16 Ga. App. 216, 84 S. E. 975. 'The jurisdiction of a court is determined by its power or its lack of power to deal with a plaintiff's petition.' *Garfield Oil Mills v. Stephens*, 16 Ga. App. 655, 85 S. E. 983, 986. 'A court of competent jurisdiction is one that has jurisdiction both of the person and the subject-matter.' *English v. Central of Ga. Ry. Co.*, 7 Ga. App. 263, 66 S. E. 969."

To the same effect are the decisions of this court. In the case of *Blackburn vs. Portland Gold Mining Co.*, 175 U. S. 571, (relied upon by petitioners herein), the court was concerned with the question whether the phrase "a court of competent jurisdiction" authorized suit in a federal court notwithstanding the lack of diversity of citizenship. In holding that such phrase did not convey any more jurisdiction upon the federal courts than already existed with respect to the parties litigant, the court stated:

"We think the intention of Congress, in this legislation, was to leave open to suitors all courts competent to determine the question of the right of possession. If the parties to the controversy were citizens of

different States and if the matter in dispute exceeded the sum or value of two thousand dollars, then the claimant might elect to commence proceedings in a Federal or in a state court, because either would be competent to determine the question of the right of possession. *But if the usual conditions of Federal jurisdiction did not exist, that is, if there was no adverse citizenship, and if the matter in dispute did not exceed two thousand dollars, then the party claimant could proceed in a state court.*" (Italics Added).

This view was later affirmed in the case of Shoshone Mining Company vs. Rutter, 177 U. S. 506. This case is also cited by petitioners and the language of Mr. Justice Brewer is quoted at Pages 12, 13 of their brief. The determining factor expressed in the opinion is as follows:

"Leaving the matter as it did, it unquestionably meant that *the competency of the court should be determined by rules theretofore prescribed in respect to the jurisdiction of the Federal courts.*" (Italics added.)

The court then makes the following practical analysis:

"In that view, if the adverse suit were between citizens of different States, and the value of the thing in controversy exceeded \$2000, then by virtue of the general provisions of the statutes the Federal courts might take jurisdiction, or, if the suit was one arising under the Constitution or the laws of the United States, and the amount in controversy was over \$2000, then also the Federal courts might take jurisdiction. Conversely, it would be true that if the amount in controversy was not in excess of \$2000, or if the parties were not citizens of different States, and the suit was not one arising under the Constitution or laws of the United States, the Federal courts could not take jurisdiction."



See also *Stringer vs. Griffin Grocery Co.*, (Texas Civil Appeals), 149 S. W. (2d) 158, where it was held:

“The reasonable interpretation of the phrase, ‘any court of competent jurisdiction,’ is generally held in both state and Federal courts to mean any Federal, state or territorial court, *whose jurisdiction over cases of like nature is not prohibited by law.*” (Italics added.)

The conclusion to be reached from the foregoing authorities is that whenever the legislature, whether state or federal, uses the term “in any court of competent jurisdiction” with reference to actions which may be brought by parties litigant, such words refer generally to the courts in which the parties litigant would, *without regard to the phrase used*, be entitled to appear and prosecute or defend any action brought. Such words are not words of grant whereby any court, whether state or federal, is vested with greater or additional powers than those which it already possessed. Without specifically enumerating the various courts which may be resorted to by the parties concerned, the legislature merely says that the individuals concerned may go to the proper court to obtain redress for any alleged grievance. Indeed, it would be impossible in many instances, for the legislature to designate specifically which are the proper courts. What may be the proper court to certain parties in certain types of litigation may not be the proper court where the amount involved changes or where different parties are concerned. In the case of *Texas Employers Insurance Association vs. Numanaker*, supra, the county court was a court of competent jurisdiction if the amount involved did not exceed a specified amount. Again, in the case of *Blackburn vs. Portland Gold Mining Co.*, supra, even though the statute using the words “court of

competent jurisdiction" was a federal statute, redress in the federal court was denied because there was not diversity of citizenship.

Under the provisions of Section 80-11-11, Utah Code Annotated, 1943, it would not be possible for a person to resort to the federal court in a suit against a county or municipality unless the conditions requisite for federal jurisdiction were otherwise present. So, likewise, suit against the State of Utah is not authorized in the federal court unless the basis for jurisdiction exists independent of the statutory designation that a suit might be brought "in any court of competent jurisdiction." The 11th Amendment prohibiting the federal court from assuming jurisdiction in cases against the State--and the State of Utah not otherwise having consented to be sued in the federal court or conferred jurisdiction on the federal court in such suits, the actions in the instant matter were properly dismissed by the Circuit Court.

That the phrase "any court of competent jurisdiction" is used by way of reference and not by way of granting or conferring additional powers or jurisdiction, is clearly shown by the use of such phraseology in other sections of the Occupation Tax statute, as well as various other legislative enactments. Section 80-5-80, Utah Code Annotated, 1943, (Appendix p. V), authorizes action by the State Tax Commission "in any court of competent jurisdiction" to foreclose a lien for the payment of the occupation tax on a mine or mining claim. If the provisions of Sections 80-5-76 and 80-11-11 authorize suit in a federal court against the State of Utah, then, likewise, Section 80-5-80 must authorize suit in the federal court by the State of Utah. Since, however, the state

courts jurisdiction or power to pass on the constitutionality of the State Irrigation and Conservation District law? Or did the legislature merely use the language in a generic sense without limiting or enlarging powers theretofore held by any court, whether state or federal? See *Broadwater-Missouri Water Users' Assn. vs. Montana Power Co.*, 9th Cir., 139 Fed. (2d) 998.

By Section 3-9-22, Utah Code Annotated, 1943,<sup>2</sup> the legislature authorized any action of the State Board of Agriculture with reference to granting, refusing to grant, or suspending a produce dealer's license to be "reviewed by any court of competent jurisdiction." Did the legislature confer jurisdiction on the federal court to review any action of the State Board of Agriculture and thereby annex the federal district court to the system of state courts for the purpose of administering our local statutes?

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son be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this Act, but shall be confined in its operation to the particular part thereof directly involved in the controversy wherein such judgment shall have been rendered."

<sup>2</sup> Section 3-9-22, U.C.A. 1943.

"Any action of the state board of agriculture with reference to the granting of, or the refusal to grant, or to renew any license, or with reference to the revocation or suspension of any license granted under the provisions of this act, may be reviewed by any court of competent jurisdiction; but pending final determination of any such review, in the case of the revocation or suspension of the license of any person licensed hereunder, such license shall be deemed in full force and effect pending the expiration of the license period or the final determination of such proceedings whichever is first in point of time."

Section 3-10a-16, Utah Code Annotated, 1943,<sup>1</sup> authorizes any order of the State Board of Agriculture substantially affecting the rights of any interested party in connection with the administration of the Milk and Cream Marketing Act to be "reviewed by any court of competent jurisdiction." Such action must be commenced within 90 days from the effective date of the order or after the injurious effect complained of becomes reasonably apparent. Certainly, citizens of this state may not appeal to the federal court to review an order of the State Board of Agriculture in this or any other connection. Nor would a suit by citizens of another state lie in the federal court against the State Board of Agriculture, the latter being an agency of the State and the State of Utah not being a person for the purpose of diversity of citizenship. See also *Craig, State Tax Collector of the State of Mississippi vs. Southern Natural Gas Company*, 9th Cir., 125 Fed. (2d) 66; *Query vs. 206 Cases of Assorted Liquor* (D.C.W.D. So. Cal.), 49 Fed. Supp. 693.

Petitioners further argue that "there has been a very long-standing and well-recognized judicial and administrative construction of Section 80-11-11, directly contrary to the construction which it was accorded by the majority below."

We submit there has been no judicial or administrative construction of Section 80-11-11 which could be interpreted to

<sup>1</sup>Sec. 3-10a-16, U.C.A. 1943.

"Any order of the state board hereunder substantially affecting the rights of any interested party may be reviewed by any court of competent jurisdiction. Any such action must be commenced within ninety days after the effective date of the order complained of or within ninety days after the injurious effect complained of becomes reasonably apparent." 3.

authorize a suit against the State of Utah in the federal courts. The cases cited by respondents and appearing on Page 10 of their brief are all suits against the counties or county officers. It is apparent that the question of immunity from suit by the State of Utah could not have been raised in such cases. The fact, therefore, that the Attorney General of this state may have participated in some of those actions gives no weight to any contention that the state has, by administrative construction, authorized suit against it in the federal courts. The Attorney General is given supervisory powers over the county attorneys, "in all matters pertaining to the duties of their offices"<sup>1</sup> and it was, therefore, entirely proper for him to appear as counsel in some of the actions referred to.

Nor do the cases cited on Pages 14 and 15 of petitioners' brief construing the phrase "any court of competent jurisdiction" require a holding in the instant case that the State of Utah has waived its immunity from suit in the federal courts. In the language of counsel's brief, the phrase applies to federal and state courts indiscriminately *only* where the "facts otherwise essential to federal jurisdiction [are] present." The facts otherwise essential to federal jurisdiction not being present in these cases—the State of Utah not having theretofore consented to be sued in the federal courts—the federal district court should not have taken jurisdiction and the cases were properly dismissed by the Circuit Court of Appeals.

<sup>1</sup> Sec. 87-6-1(5), Utah Code Annotated 1943.

Not only does Section 80-11-11 fail to confer jurisdiction on the federal courts in cases where the State of Utah is a party, but Section 80-5-76, providing that a suit may be brought for the recovery of occupation taxes paid under protest, fails to waive any immunity which the State of Utah may have under the 11th Amendment of the Constitution of the United States. The entire subject matter of this latter section is concerned with the courts "of this state." It reads:

"No court of this state except the supreme court shall have jurisdiction to review, alter, or annul any decision of the tax commission or to suspend or delay the operation or execution thereof; *provided*, any taxpayer may pay his occupation tax under protest and thereafter bring an action in any court of competent jurisdiction for the return thereof as provided by Section 80-11-11, Revised Statutes of Utah, 1933."

It would be useless for anyone to attempt to argue that the first part of this section refers to the federal courts for the reason that the language is expressly limited to the courts "of this state." Too, as hereinbefore noted, it would have been useless for the legislature to have attempted to legislate with reference to jurisdiction of the federal courts in such matters—the State of Utah not being a person for the purpose of satisfying the requirement of diversity of citizenship under the federal rules of practice and procedure. How can it then be argued that the second portion of Section 80-5-76 has any wider application than the first part referring

"It is the duty of the Attorney General \* \* \* to exercise supervisory powers over the district and county attorneys of the state in all matters pertaining to the duties of their offices, and from time to time require of them reports as to the condition of public business entrusted to their charge."

to courts of this state. At most, it was a mere designation by the legislature that the aggrieved taxpayer could bring his action in the proper state court in accordance with the provisions of Section 80-11-11—the question of which courts would have jurisdiction not being considered.

The identical phraseology, to-wit, “any court of competent jurisdiction” is used in Section 64-2614(a) of Burns’ Indiana Statutes Annotated (1943 Replacement) construed by this court in the case of *Ford Motor Company vs. Department of Treasury*, 323 U. S. 459, 65 Sup. Ct. 347, 89 L. Ed. .... In holding that such language did not authorize a suit in the federal courts, this court affirmed its holding in the case of *Great Northern Life Insurance Company vs. Read*, 322 U. S. 47, 64 Sup. Ct. 873, 88 L. Ed. 781, as follows:

“When a state authorizes a suit against itself to do justice to taxpayers who deem themselves injured by any exaction, it is not consonant with our dual system for the federal court to be astute to read the consent to embrace federal as well as state courts. \*\*\*

When we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state’s intention to submit its fiscal problems to other courts than those of its own creation must be found.”

We submit that a declaration of an intention of the State of Utah to submit its fiscal problems to the federal court is not found in any of the language of our state statutes. On the contrary, the entire procedure set up by statute whereby a taxpayer may obtain a review or hearing on an occupation tax which he claims to have been exacted unlawfully reveals an intent to limit such review or hearing to state courts. Section 80-5-74, Utah Code Annotated, 1943, provides that



the decision of the Tax Commission, after hearing on the matter of the amount of the occupation tax assessment shall become final upon the expiration of 30 days unless within that time proceedings are taken for a review by the Supreme Court upon a writ of certiorari, pursuant to Section 80-5-75. Under the provisions of this latter section, a taxpayer may obtain a writ of certiorari or review from the Supreme Court of the state, but upon such hearing before the Supreme Court, "no new or additional evidence may be introduced, but the case shall be heard on the record made before the Tax Commission as certified to by it." In such case, as a condition precedent to the making of the application to the Supreme Court for the writ, the taxpayer must file an undertaking in sufficient amount to cover the taxes, interest and other charges which have accrued or which may accrue by reason of the application for the writ, or in lieu thereof deposit the amount of such taxes, interest and other charges with the State Tax Commission. (See Section 80-5-77, Appendix, page III.)

In the alternative, however, the taxpayer, instead of applying to the Supreme Court directly for a writ of certiorari to review the decision of the Tax Commission, may pay his occupation tax under protest and "bring an action in any court of competent jurisdiction for the return thereof." This remedy affords the taxpayer the opportunity of presenting evidence before the court and making a record upon which the court may render its decision. But, as a condition precedent thereto, it must pay under protest the tax assessed. Thereafter, an appeal, as in other cases, may be taken to the Supreme Court of the state. This alternative remedy, however, does not contemplate that the taxpayer may go

beyond the state courts in bringing his action for a refund. There is no more reason for construing the language of the statute to authorize suits in the federal court than there is to authorize suits in inferior state courts, such as city courts and justice courts—or 's a matter of fact in courts outside the State of Utah. The Silver King Coalition Mines Company is a corporation of the State of Nevada. If, as Petitioners contend, the language "any court of competent jurisdiction" authorizes suits to be brought in any court, state or federal, without limitation, there is no reason why the Silver King Coalition Mines Company might not commence an action in the Federal Court for the District of Nevada contending that such a court is also a court of "competent jurisdiction" within the meaning of the statute. Certainly, such was not the intendment of the legislature in enacting this provision, nor was it intended to enlarge the jurisdiction of the city courts and justice courts of our state to include the recovery of taxes paid under protest. The "courts" contemplated by the statute in which actions such as these may be brought are our state district courts, which, under the Constitution and the statutes of this state "have original jurisdiction in all matters civil and criminal, not excepted in this Constitution, and not prohibited by law." (Article VIII, Section 7, Constitution of Utah. See also Section 20-3-4, Utah Code Annotated, 1943.)

Because Section 80-11-11, Utah Code Annotated, 1943, provides for actions to recover taxes paid under protest against "the state, county, municipality or other taxing unit on whose behalf the same was collected," it was impossible to designate the particular district court in which such action could be brought. It was certainly not intended that an action

could be brought against a particular county in a state district court other than one in which the county is situated. In each instance the district court of the state in which the county or other taxing unit is situated is the proper court in which to commence the action, it being the court "of competent jurisdiction" referred to in the statute. Likewise, the federal district court might be a "court of competent jurisdiction" in a suit by a taxpayer against a county, if the incidents necessary for its jurisdiction are otherwise present.

It is our belief that the legislature of this state intended to treat all persons concerned in the same manner when it used the language "in any court of competent jurisdiction." That is to say, the statute itself does not give to any party any additional remedy or any right to bring a suit in any court which, under the laws of the United States and the State of Utah, did not otherwise have jurisdiction to hear and determine the matter. Our state legislature could not confer any right on the citizens of this state to bring a suit in the federal district court unless such court had jurisdiction independent of our statute. Likewise, the legislature could not confer authority upon the State Tax Commission to enforce collection of any occupation tax in any federal district court. Certainly, the language of Section 80-5-76 should not be construed to accord greater rights to citizens of foreign states than it did to citizens of this state or to the state itself with reference to the state taxing structure and the various proceedings thereunder.

When the legislature actually intended to waive immunity of this state in connection with suits in the federal court, it had no difficulty in finding express language in which to

do it. By the Laws of Utah, 1939, Chapter 120, the legislature provided that under certain conditions "the consent of the State of Utah is given to be named a party in any suit \* \* \* in any court of this state or of the United States, for the recovery of any property, real or personal, or for the possession thereof, or to quiet title thereto." It was further provided, however, that "no judgment for costs or other money judgment shall be rendered against the state in any suit or proceeding which may be instituted under the provisions of this chapter."

This is the first instance in the history of this state that express authorization has been given to sue the State of Utah in the federal courts. Even then, the type of judgment which may be entered against the state is limited to the kind specified in the statutory provision, and no money judgment is authorized.

<sup>1</sup>Sec. 104-3-27, U.C.A. 1943.

"Upon the conditions herein prescribed the consent of the State of Utah is given to be named a party in any suit which is now pending or which may hereafter be brought in any court of this state or of the United States for the recovery of any property real or personal or for the possession thereof or to quiet title thereto; or to foreclose mortgages or other liens thereon or to determine any adverse claim thereon; or secure an adjudication touching any mortgage or other lien the State of Utah may have or claim on the property involved. Service upon the State of Utah shall be made by serving the summons upon the attorney general or his deputy, and it shall be the duty of the attorney general to represent the interests of the state in such cases. No judgment for costs or other money judgment shall be rendered against the state in any suit or proceeding which may be instituted under the provisions of this chapter nor shall the state be or become liable for the payment of costs of any such suit or proceeding or any part thereof."

We repeat, the provision in Sec. 80-5-76 to the effect that a taxpayer may "bring an action in any court of competent jurisdiction" designates the state courts which, without regard to the statutory provision, would already have jurisdiction of the parties and the subject matter. It does not extend the jurisdiction of any state court, nor does it extend the jurisdiction of the Federal courts beyond that which such courts have under the Federal Constitution. We think the decisions of this court in the Ford Motor Company case and the Read case, hereinafter cited, are conclusive on this point. As stated in those cases, such a construction of the state statute "leaves open the road to review in this Court all constitutional grounds after the issues have been passed upon by state courts." There is a distinct advantage in having the state courts pass initially upon questions which involve the state's liability for tax refunds.

See also Minnesota vs. United States, 305 U. S. 382, 59 S. Ct. 292; 83 L. Ed. 235, where conversely to the proposition here urged, the Supreme Court held that a federal statute authorizing condemnation suits with regard to Indian lands did not authorize a suit against the United States in a state court.

## II.

### THESE ACTIONS AGAINST THE STATE TAX COMMISSION ARE, IN FACT, SUITS AGAINST THE STATE OF UTAH

That the actions here involved are in fact suits against the State of Utah seems readily apparent. A cursory reading of the pleadings in each case will reveal that the tax sought

to be recovered is a state tax levied by the Tax Commission on behalf of the state pursuant to constitutional and statutory authorization. The Tax Commission was created by constitutional amendment in 1930 to replace the State Board of Equalization, the constitutional body theretofore existing since statehood. As such, the Tax Commission took over the functions and responsibilities of the State Board of Equalization to "administer and supervise the tax laws of the State" (Article XIII, Sec. 11, Constitution of Utah). In furtherance of the constitutional provision, the legislature provided for the organization of the Tax Commission, authorized it to sue and be sued, and provided that it might prescribe rules and regulations for its own government and the transaction of its business. (Sees. 80-5-37 to 80-5-47, U. C. A., 1943)

It is respondents' position that the principles announced by this court in the cases of *Ford Motor Company vs. Department of Treasury* and *Great Northern Life Insurance Company vs. Read*, *supra*, apply with equal vigor to the facts in the instant matters.

With reference to the nature of the suit against the Indiana Department of Treasury and the individual members thereof this court in the *Ford Motor Company* case held:

"Petitioner's suit in the federal District Court is based on Sec. 64-2614(a) of the Indiana statutes and therefore constitutes an action against the state, not against the collecting official as an individual. Petitioner brought its action in strict accord with Sec. 64-2614(a). The action is against the state's department of treasury. The complaint carefully details compliance with the provisions of Sec. 64-2614(a) which require a timely application for refund to the department as a prerequisite to a court action authorized in the section. It is true the petitioner in the present

proceeding joined the Governor, Treasurer and Auditor of the state as defendants, who 'together constitute the Board of Department of Treasury of the State of Indiana.' But, they were joined as the collective representatives of the state, not as individuals against whom a personal judgment is sought. The petitioner did not assert any claim to a personal judgment against these individuals for the contested tax payments. The petitioner's claim is for a 'refund,' not for the imposition of personal liability on individual defendants for sums illegally exacted. We have previously held that the nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding. *Ex parte Ayres*, 123 U. S. 443, 490, 499, 8 S. Ct. 164, 174, 175, 31 L. Ed. 216; *Ex parte State of New York*, 256 U. S. 490, 500, 41 S. Ct. 588, 590, 65 L. Ed. 1057; *Worcester County Trust Co. v. Riley*, 302 U. S. 292, 296, 298, 58 S. Ct. 185, 186, 187, 82 L. Ed. 268. *And when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.* *Smith v. Reeves*, supra; *Great Northern Life Insurance Co. v. Read*, supra. We are of the opinion therefore, that the present proceeding was brought in reliance on Sec. 64-2614(a) and is a suit against the state." (Italics added.)

Petitioners' complaints set forth complete compliance with the statutory provisions relative to levy and assessment of the occupation tax, protest of the same by petitioners and request for hearing, denial of petitioners' protest by the Tax Commission and notice thereof, payment of the tax under protest to the State Tax Commission and timely suit to recover the amount alleged to have been unlawfully collected. (R. 8, 9, 122, 123). Speaking of such procedure in the *Ford Motor Company* case, this court further stated:



"We are of the opinion that petitioner's suit in the instant case against the department and the individuals as the board constitutes an action against the State of Indiana. A state statute prescribed the procedure for obtaining refund of taxes illegally exacted, providing that a taxpayer first file a timely application for a refund with the state department of treasury. Upon denial of such claim, the taxpayer is authorized to recover the illegal exaction in an action against the 'department.' Judgment obtained in such action is to be satisfied by payment 'out of any funds in the state treasury.' This section clearly provides for an action against the state, as opposed to one against the collecting official individually. No state court decision has been called to our attention which would indicate that a different interpretation of this statute has been adopted by state courts."

While the Supreme Court of Utah has never had occasion to determine whether an action against the Tax Commission is an action against the state, nevertheless, it has been determined that an action against the State Road Commission is such an action against the state. In the case of *State by State Road Commission vs. District Court*, 94 Utah 384, 78 P. (2d) 502, the State Road Commission sought a writ of prohibition against the District Court to prohibit the latter from proceeding in a case wherein the State Road Commission was a party defendant. The Supreme Court in considering the nature of the suit, insofar as the State Road Commission was concerned, held:

"The State Road Commission is an agency of the State. It is clothed with certain powers in the nature of corporate powers, but cannot be considered to be a corporation. It may sue in its own name, and section 36-2-1, R. S. Utah 1933, as amended by Laws of Utah 1935, c. 35, provides that it may be sued only on written contracts. Being an unincorporated agency of the

State, a suit against it is a suit against the State. The State cannot be sued unless it has given its consent or has waived its immunity. *Wilkinson v. State*, 42 Utah 483, 134 P. 626, 631; *Campbell Building Co. v. State Road Commission (Utah)* 70 P. (2d) 857. Defendants do not argue in their briefs that consent has been given by the State or that there has been any waiver of the State's immunity from suit. Their argument is that the injunction suit is not against the State. We cannot agree with this argument in so far as the Road Commission as such is concerned. It is an agency of the State, and a suit against it is a suit against the State."

As to the individual members of the State Road Commission, the court further stated that if such members "are personally made parties defendant in the injunction suit, the case will be different than if prosecuted against the Road Commission as a body." As to such individual members, the court, on authority of *United States vs. Lee*, 106 U. S. 196, 1 Sup. Ct. 240, 27 L. Ed. 171, and *Tindal vs. Wesley*, 167 U. S. 204, 17 Sup. Ct. 770, 42 L. Ed. 137, determined that the members might be sued individually to enjoin their unlawful acts. As will hereinafter appear with respect to such individual members, however, the State Road Commission case, as above cited, is distinguishable from the cases here involved.

Our statute relative to the creation of the State Road Commission, "at the time the above case was decided, made of it a state agency with powers and duties relative to the construction and maintenance of state roads similar to the powers and duties held by the State Tax Commission relative to the assessment and collection of taxes. Section 36-2-1; R. S. U. 1933, provides for the organization of the State Road

Commission and authorizes it to sue in its own name and to be sued "on written contracts made by it or under its authority." Section 36-2-2 requires it to maintain its offices in the State Capitol and hold regular meetings on dates to be fixed. Section 36-2-3 provides that the Commission shall have power to "administer the state highways and exercise those powers and duties which relate to the termination and carrying out of the general policy of the state relating thereto." Section 36-2-4 outlines additional powers, including the power to formulate and adopt rules and regulations for the expenditure of public funds, for letting contracts for any work which it is authorized by law to do, and for the governing of the use of public roads; the power to prescribe qualifications and duties of all employees and to employ such assistants as may be necessary to carry out their work; and the power to adopt a seal, filing a description and impression thereof in the office of the Secretary of State. With the exception that the State Tax Commission may be sued generally while the State Road Commission may be sued only upon contracts entered into by it, the nature and functions of the two bodies in their respective fields are identical.

We, therefore, have a definite pronouncement by our State Supreme Court to the effect that a suit against a state agency such as the Tax Commission is, in fact, a suit against the State of Utah. Furthermore, in the Ford Motor Company case, this court relying upon the Read case, stated:

"In that case this Court held that as the suit was against a state official as such, through proceedings which were authorized by statute to compel him to carry out with state funds the state's agreement to reimburse moneys illegally exacted under color of tax power, the suit was one against the state. We

said that such a suit was clearly distinguishable from actions against a tax collector to recover a personal judgment for money wrongfully collected under color of state law. 322 U. S. 47, 50, 51, 64 S. Ct. 873, 874, 875. Where relief is sought under general law from wrongful acts of state officials, the sovereign's immunity under the Eleventh Amendment does not extend to wrongful individual action, and the citizen is allowed a remedy against the wrongdoer personally. 280, 32 S. Ct. 216, 56 L. Ed. 436, Ann. Cas. 1913C, 280, 32 St. Ct. 216, 56 L. Ed. 436, Ann. Cas. 1913C, 1050; cf. *Matthews v. Rodgers*, 284 U. S. 521, 528, 52 S. Ct. 217, 220, 76 L. Ed. 447. Where, however, an action is authorized by statute against a state officer in his official capacity and constituting an action against the state, the Eleventh Amendment operates to bar suit except in so far as the statute waives state immunity from suit. *Smith v. Reeves*, 178 U. S. 436, 20 S. Ct. 919, 44 L. Ed. 1140; *Great Northern Life Insurance Co. v. Read*, 322 U. S. 47, 64 S. Ct. 873."

Numerous cases are cited by petitioners to support the proposition that the instant actions are not suits against the State of Utah. Those cases are, however, for the most part, clearly distinguishable from the facts in the instant cases in that they were either suits against the individual to recover specific property wrongfully obtained and held (*Tindal vs. Wesley*, *supra*), or suits to enjoin the individual action of state officers who threatened to commit acts of wrong and injury to the right and property of the plaintiff under color of an unconstitutional statute (*Pennoyer vs. McConaughy*, 140 U. S. 1, 35 L. Ed. 362):

Several cases are cited and distinguished by this court in its opinion in the *Read* case as follows: 8

"The case therefore is plainly distinguishable from those to recover personally from a tax collector money wrongfully exacted by him under color of state

law, *Atchison, T. & S. F. Ry. Co. v. O'Connor*, 223 U. S. 280; cf. *Matthews v. Rodgers*, 284 U. S. 521, 528; to recover under general law possession of specific property likewise wrongfully obtained or held, *Tindal v. Wesley*, 167 U. S. 204, 221; *Virginia Coupon Cases*, 114 U. S. 269, 285; *United States v. Lee*, 106 U. S. 196; to perform a plain ministerial duty, *Board of Liquidation v. McComb*, 92 U. S. 531, 541; *Rolston v. Missouri Fund Comm'rs.*, 120 U. S. 390, 411; or to enjoin an affirmative act to the injury of plaintiff, *Sterling v. Constantin*, 287 U. S. 378, 393; *Tomlinson v. Branch*, 15 Wall. 460; *Davis v. Gray*, 16 Wall. 203, 220; *In re Tyler*, 149 U. S. 164, 190. Only in *Smith v. Reeves* was the action authorized by statute against the officer in his official capacity. In the other instances relief was sought under general law from wrongful acts of officials. In such cases the immunity of the sovereign does not extend to wrongful individual action and the citizen is allowed a remedy against the wrongdoer personally."

The opinion then continues as to suits against the sovereign:

"This ruling that a state could not be controlled by courts in the performance of its political duties through suits against its officials has been consistently followed. *Chandler v. Dix*, 194 U. S. 590; *Pitts v. McGhee*, 172 U. S. 516, 529; *Murray v. Wilson Distilling Co.*, 213 U. S. 151, 167; *Lankford v. Platte Iron Works Co.*, 235 U. S. 461, 468 et seq.; *Ex parte State of New York*, No. 1, 256 U. S. 490, 500; *Worcester County Co. v. Riley*, 302 U. S. 292, 296, 299. Efforts to force, through suits against officials, performance of promises by a state collide directly with the necessity that a sovereign must be free from judicial compulsion in the carrying out of its policies within the limits of the Constitution. *Monaco v. Mississippi*, 292 U. S. 313, 320; *Lousiana v. Jumel*, 167 U. S. 711, 720. A state's freedom from litigation was established as a constitutional right through the Eleventh Amendment.

The inherent nature of sovereignty prevents actions against a state by its own citizens without its consent. *Hans v. Louisiana*, 134 U. S. 1, 10, 16."

The following authorities also recognize the distinction between suits against officers as individuals and suits against officials in their representative capacity which are in effect suits against the state: *State Highway Commission v. Utah Const. Co.*, 278 U. S. 194, 49 Sup. Ct. State 104, 73 L. Ed. 262; *Smith v. Reeves*, 178 U. S. 436, 20 Sup. Ct. 919, 44 L. Ed. 1140; *People ex rel. McColgan v. Bruce*, supra; *Query v. 206 Cases of Assorted Liquor*, supra; *Broadwater-Missouri Water Users Ass'n v. Montana Power Co.*, supra; *Craig v. Southern Natural Gas Co.*, supra. See, also, the annotation on this subject contained in 147 A. L. R. 786, 794.

Petitioners rely on the case of *Thomas v. Ohio State University Trustees*, 195 U. S. 207, 49 L. Ed. 160. There the question whether the suit was against the State of Ohio was not raised. On the facts, that case appears to be one against private parties and not against the State of Ohio. Likewise, in the case of *Parks vs. Carriere Consolidated School District*, 5th Cir., 12 Fed. (2d) 37, the action was against a political subdivision of the state. A school district, like a county or municipality, has long been considered a citizen of the state of its organization. ○

In the case of *Louisiana Highway Comm. vs. Farnsworth*, 74 Fed. (2d) 910, the court decided the question of whether the action was against the state upon the authority of the Louisiana case of *Saint vs. Allen*, 172 La. 350, 134 So. 236. The Circuit Court held:

"The question whether Louisiana highway commission is or is not subject to be sued on such a contract is one of Louisiana law. \* \* \* It is not denied that, but for the decision rendered in the case of Saint vs. Allen, supra, the decision in the case of State Highway Comm. vs. Utah Const. Co., 278 U. S. 191, 49 Sup. Ct. 104, 73 L. Ed. 262, which was much relied on by counsel for the appellant, would be persuasive in support of a different conclusion."

We submit that the Farnsworth case is contrary to the decision of our State Supreme Court in State by State Road Commission vs. District Court, supra. So, too, the case of Hunkin-Conkey Const. Co. vs. Pa. T. Comm., 34 Fed. Supp. 26, decided by the federal district court, is inconsistent with the decisions not only of this court but of the Supreme Court of the State of Utah.

Petitioners further rely upon the case of State Life Insurance Company vs. Daniel, 6 Fed. Supp. 1015, decided by the District Court for the Western District of Texas. That court determined that an action under the Texas statute referred to was not a suit against the state. However, a contrary holding has since been made by the Court of Civil Appeals of Texas in the case of Hansen vs. Blackmon, 169 S. W. (2d) 955. We quote from the court's opinion as follows:

"The suit authorized by Sec. 2 of Art. 7057b, R. C. S., Vernon's Ann. Civ. St. Art. 7057b, Sec. 2, is in effect a suit against the State, since judgment in a taxpayer's favor would operate directly as a liability of the State, and must of necessity be paid out of the State Treasury. Natl. Biscuit Co. v. State, Tex. Civ. App., 129 S. W. (2d) 494, reversed on other grounds, 134 Tex. 293, 135 S. W. (2d) 687; 38 Tex. Jur. P. 857, Sec. 36.



"In such a suit the authority granted by the statute is jurisdictional, since it is elementary that the State cannot be sued without its consent."

In the case of *State of Missouri vs. Homesteaders Life Association* (8th Cir., 90 Fed. (2d) 543, the action was by the Superintendent of the Insurance Department. The court held that the proceeding was not a suit by the State of Missouri for the reason that Section 11276 of the Revised Statutes of Missouri, 1929, as interpreted by the Supreme Court of Missouri in the case of *State vs. Williams*, 221 Mo. 227, 120 S. W. 740, provided that the Attorney General should institute all suits in the name of the state. Since the Attorney General did not appear in the *Homesteaders Life Association* case, it did not sufficiently appear that in a "legal and technical sense" the state was a party to the suit.

Again, the decision in the case of *Bromwell Brush and Wire Goods Co. vs. State Board of Charities and Corrections* (D. C. E. D. Ky.), 279 Fed. 440, was affirmed by the Circuit Court of Appeals for the Sixth Circuit (288 Fed. 1018) upon the narrow ground that:

" \* \* \* the state board of control of the commonwealth of Kentucky had no power to make the contract for whose asserted breach this action was brought, and that the District Court properly sustained, for that reason, defendant's general demurrer to plaintiff's petition and dismissed the cause, the judgment of the District Court of the United States for the Eastern District of Kentucky is hereby affirmed, for the reasons stated in the opinion of the District Judge without consideration of the other presented defenses to the action, but without prejudice to such other remedy, if any, as plaintiff may have with respect to the warehouse erected by plaintiff upon the premises of the State Board of Charities and Corrections of the commonwealth of Kentucky."

The question, therefore, of whether the action was against the State of Kentucky was not considered.

Petitioners further refer to the case of State vs. District Court of Salt Lake County, 102 Utah 284, 115 P. (2d) 913, on rehearing, 102 Utah 290, 128 P. (2d) 471. The concurring opinion of Mr. Justice Larsen is quoted to the effect that an action "should lie against the party who has the money. *Such party is not the state under the provisions of the statute.*" We submit that the pleadings in the instant cases affirmatively show that these actions are not against the party who has the tax monies alleged to have been unlawfully collected. Pursuant to the provisions of Section 80-5-71, the occupation taxes collected by the State Tax Commission were promptly paid over to the State Treasurer. As alleged by the complaints, said protested monies are being retained by the State Treasurer, as required by Section 80-11-13, until it shall have been determined whether the tax was lawfully or unlawfully collected. (R. 10, 124). It is of further interest to note that there is no majority opinion of the court in the case just referred to, the majority court being agreed only on the proposition that the state "had consented to be sued in a tax recovery matter such as this." Mr. Chief Justice Moffat, however, who was assigned to write the opinion of the court, stated:

"Just what distinction, functionally considered, there may be found to exist between the state and an authorized agency of the state may not be easy to define."

While it is true that Section 80-11-11 speaks in the alternative—the taxpayer may bring an action against the officer to whom the tax was paid or against the state, county

or municipality or taxing unit on whose behalf the same is collected—there can be no argument that the tax here involved was paid to “an officer.” It is alleged, and the facts show that the taxes were paid by petitioners to the State Tax Commission—an agency of the state. Taxes paid to a county are usually paid to an officer thereof, hence, the provision that an action might be brought against an officer collecting the tax. Whether such an action would be a suit against the officer in his official or individual capacity need not be here considered since the suit is against the State of Utah through its agency, the State Tax Commission.

We submit that the actions here commenced by petitioners against the State Tax Commission and the members constituting said Commission for the recovery of taxes paid under protest were brought pursuant to statutory authorization and as such are suits against the State of Utah.

### III.

#### THE MEMBERS OF THE STATE TAX COMMISSION ARE SUED IN THEIR REPRESENTATIVE CAPACITY AND NOT AS INDIVIDUALS.

The Circuit Court of Appeals was apparently unanimous on the proposition that the instant suits are against the State of Utah and not against the individual members of the State Tax Commission, since it was unnecessary to discuss the question of immunity of the state from suit unless the actions were considered to be against the state. Under the authority of *Ford Motor Company vs. Department of Treasury*, supra, we do not see how it can be contended that the members of the Tax Commission are sued individually.

As therein pointed out, the statutes prescribe the procedure for obtaining refund of taxes illegally exacted. The complaints carefully detail compliance with the provisions precedent to suit. Petitioners do not assert "any claim to a personal judgment against these individuals for the contested tax payments." Their claim is "for a 'refund,' not for the imposition of personal liability on individual defendants for sums illegally exacted." As further stated by the court:

"And when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants."

Nor do we believe that the complaints in the instant matters plead any cause of action against the individual defendants but on the contrary reveal an intention to sue them in their representative capacity as the State Tax Commission. The title in each cause lists them as "constituting said State Tax Commission." It is not alleged that the members of the Tax Commission, or either of them, received or exacted payment of the taxes from the petitioners. On the contrary, it is specifically alleged that the defendant, State Tax Commission "exacted payment" of the amount of the taxes assessed, and that said payment was made to the Commission (R. 10, 124). Respondents' answer in each case admits that the State Tax Commission exacted payment of the tax involved and that said tax was paid to said State Tax Commission (R. 15, 129).

It is true that there is a distinction to be made between a suit brought against a state official as an individual and a suit brought against a state official in his representative

capacity. In the case of *State by State Road Commission vs. District Court*, supra, the members of the State Road Commission were not joined as parties defendant, either as individuals or in their representative capacity. The court held that in the event they should be joined as defendants—in their individual capacity—there would be no immunity from suit on the grounds that the state was the defendant. Under the principles announced in the case of *Tindal vs. Wesley*, supra, it would be possible to bring an action against state officers as individuals "to recover under general law possession of specific property likewise wrongfully obtained or held." There is no allegation or showing here that the individual defendants either collected or held at any time the taxes paid under protest by petitioners.

It is argued that the provisions of Section 80-11-13, Utah Code Annotated, 1943, place no responsibility upon the state for the reimbursement of defendants if they are held individually liable. That section requires the State Treasurer to retain all taxes paid under protest until it shall have been determined that said tax was lawfully or unlawfully collected. But in the event *it is* determined that the tax is unlawfully collected, the statute requires not only that the amount retained be refunded but that "any excess amount in excess of said tax required to pay said claim, including interest and costs, shall be repaid out of any unappropriated funds in the hands of the State Treasurer, or, in case it is necessary, a deficit for said amount shall be authorized. Section 80-11-12, Utah Code Annotated, 1943, provides that in any statutory action brought to recover taxes paid under protest, wherein judgment is entered for the return of any of said taxes, the plaintiff shall have judgment for the recovery thereof.

"and lawful interest thereon." In the instant cases, petitioners not only claimed but were allowed by the District Court interest at the rate of 6% from the date the taxes were paid under protest.

Finally, petitioners argue that the "customary form of bringing an action against the State Tax Commission is to sue said Commission without joining the individual members unless relief is sought against such individuals personally." The cases cited in support of such a proposition on Page 38 of petitioners' brief are, with the exception of *Peterson vs. State Tax Commission*, 106 Utah 337, 148 P. (2d) 340, all cases where a writ of review was obtained from the State Supreme Court to review the decision of the Tax Commission—such writ of review being authorized specifically by the statute. In the *Peterson* case, the Tax Commission was not a party to the original litigation but was joined only for the purpose of ascertaining the amount of the inheritance tax to be paid. No pleadings were filed against the Commission and no judgment against it was sought.

The cases heretofore cited to the effect that these actions are, in fact, suits against the state all support the proposition that the actions against the officers are in their representative capacity and not as individuals.

## CONCLUSION

By way of summary, we wish to reaffirm the following propositions:

1. The procedure authorized by Section 80-11-11, Utah Code Annotated, 1943, for the recovery of taxes paid under

protest does not constitute a waiver of the state's immunity from suit in the federal courts.

2. The use of the phrase "in any court of competent jurisdiction" in Section 80-5-76, as well as other sections of the statutes referred to, does not evidence any intent on the part of the state to waive its immunity from suit.

3. In the language of the opinion by the Circuit Court of Appeals, "it is not sufficient to say that there is nothing in the context of the statute to indicate that Utah did not intend to embrace the federal court in its waiver of immunity from suit. Before it can be sued in such courts, the statute must use language which evidences a clear intent to submit to the jurisdiction of federal courts." (R. 144.)

4. When the state actually intended to waive its immunity, it did so by providing that "the consent of the State of Utah is given to be named a party in any suit \* \* \* brought in any court of this state or of the United States" with respect to the subject matter indicated. (Sec. 104-3-27, U. C. A. 1943.)

5. The State of Utah has not, by administrative interpretation or conduct, waived its immunity from suit under the Eleventh Amendment to the Constitution of the United States.

6. The State Tax Commission and the members thereof are sued only as representatives of the state, the state being the real party in interest and the one which will alone be affected or compelled to pay any judgment that might be rendered or to which will inure benefits to accrue or result.



40. KENNECOTT COPPER CORP. & SILVER KING COAL MIN. CO.

from any judgment against the mining companies.

We, therefore, submit that the decision of the Circuit Court of Appeals should be affirmed.

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**APPENDIX**

Utah Code Annotated 1943:

Section 80-5-67.

Every person engaged in the business of mining or producing metalliferous ore shall make and file with the tax commission, on or before the tenth day of February of each year, beginning with the year 1938, on forms furnished by the tax commission, a statement containing:

(1) The name, description and location of the mine or mining claim owned and operated by him during the preceding calendar year.

(2) The number of tons of ore mined during the preceding calendar year and the disposition made of the same.

(3) The total amount received during the preceding calendar year from the sale of ore and metals.

(4) If a deduction is claimed for milling, smelting, refining, marketing or transporting the ore or the products of the same from the place where produced to the place where sold, the amount of deduction claimed therefor.

(5) Such other reasonable and necessary information as the commission may require for the proper enforcement of this act.

Sec. 80-5-68.

"If any person engaged in the business of mining metalliferous ores refuses or neglects to make or deliver to the tax commission the statement required by this act, the tax commission must fix the amount of the occupation tax from the best information or knowledge it can obtain. The tax commission for the purpose of ascertaining the correctness of any return or

for the purpose of ascertaining the amount of occupation tax that should be fixed when a return has not been filed, shall have power to examine or to cause to be examined by any agent or representative designated by it for that purpose any books, papers, records, or memoranda bearing upon the matter required to be included in the return, and may require the attendance of any officer or employee of any corporation or person required by this act to make a return or the attendance of any other person having knowledge of any pertinent fact, and may take testimony and require production of material for its information."

Sec. 80-5-70.

The tax imposed by this act shall be due and payable on or before the first day of June of the year next succeeding the calendar year when the ore or metal is sold; *provided*, the tax commission may for good cause shown upon a written application of the taxpayer extend the time of payment of the whole or any part of the tax for a period of not to exceed six months. If an extension is granted interest at the rate of six per cent per annum shall be charged on the amount of the deferred payment of the tax.

Sec. 80-5-72.

Not later than the first Monday in May of each year, the tax commission shall fix the amount of occupation tax that each person shall pay. Immediately thereafter, the person whose occupation tax is so fixed shall be notified by mail, postage prepaid, addressed to his last known place of residence, of the amount of the occupation tax so fixed.

Sec. 80-5-73.

If any person feels aggrieved because of the amount of the occupation tax fixed by the tax commission he may apply to the tax commission by written petition within ten days after notice is mailed to him for a hearing and correction of the amount of the tax.

so assessed, in which petition he shall set forth the reasons why such hearing shall be granted and the amount by which the tax should be reduced. The tax commission shall notify the petitioner of the time and place fixed by it for such hearing. After such hearing the tax commission shall make such order in the matter as may appear to it just and lawful and shall furnish a copy thereof to the petitioner.

Sec. 80-5-74.

Every decision of the tax commission shall be in writing and notice thereof shall be mailed to the taxpayer within ten days. All such decisions shall become final upon the expiration of thirty days after notice thereof shall have been mailed to the taxpayer, unless proceedings are taken within such time for a review by the supreme court upon writ of certiorari as herein provided, in which case it shall become final (1) when affirmed or modified by a judgment of the supreme court; (2) if the supreme court remands the case to the tax commission for a rehearing when it is thereafter determined as hereinabove provided with respect to the initial proceeding.

Sec. 80-5-77.

Before making application to the supreme court for a writ the full amount of taxes, interest and other charges audited and stated in the decision of the tax commission must be deposited with the tax commission and an undertaking filed with the commission in such amount and with such surety as the tax commission shall approve to the effect that if such writ is dismissed or the decision of the tax commission affirmed the applicant for the writ will pay all costs and charges which may accrue against him in the prosecution of the case, or, at the option of the applicant, such undertaking may be in a sum sufficient to cover the taxes, interest and other charges, audited or stated in such decision, plus the costs or charges which may accrue against the applicant in the prosecution of said

case, in which event the applicant shall not be required to pay such taxes, interest and other charges as a condition precedent to his application for the writ.

Sec. 80-5-78.

If the tax imposed by this chapter or any portion thereof is not paid when the same becomes due, the tax commission may issue a warrant, in duplicate under its official seal, directed to the sheriff of any county of the state commanding him to levy upon and sell the real and personal property of the taxpayer found within this county for the payment of the amount thereof, with the added penalties, interest and the cost of executing the warrant, and to return such warrant to the tax commission and pay to it the money collected by virtue thereof by a time to be therein specified, not more than sixty days from the date of the warrant.

Immediately upon receipt of said warrant in duplicate the sheriff shall file the duplicate with the clerk of the district court in his county, and thereupon the clerk shall enter in the judgment docket, in the column for judgment debtors, the name of the delinquent taxpayer mentioned in the warrant, and in appropriate columns the amount of the tax or portion thereof and penalties for which the warrant is issued and the date when such duplicate is filed, and thereupon the amount of such warrant so docketed shall have the force and effect of an execution against all personal property of the delinquent taxpayer, and shall also become a lien upon the real property of the taxpayer against whom it is issued in the same manner as a judgment duly rendered by any district court and docketed in the office of the clerk thereof. The sheriff shall thereupon proceed upon the same in all respects with like effect, and in the same manner as is prescribed by law in respect to executions issued against property upon judgments of a court of record, and shall be entitled to the same fees for his services in

executing the warrant, to be collected in the same manner.

Sec. 80-5-80.

An action for the recovery of any occupation tax due and unpaid or to foreclose a lien for the payment thereof on a mine or mining claim may be brought by the tax commission in any court of competent jurisdiction at any time within six years after the cause of action shall have accrued.

Sec. 80-5-82.

If any clause, sentence, paragraph or part of this act shall for any reason be by any court of competent jurisdiction adjudged to be invalid, such judgment shall not affect, impair or invalidate the remainder of this act, but shall be confined in its operation to the clause, sentence, paragraph or any part thereof directly involved in the controversy in which such judgment has been rendered.

# SUPREME COURT OF THE UNITED STATES.

Nos. 424-25 — OCTOBER TERM, 1945.

Kennecott Copper Corporation,  
Petitioner.

424

vs.

State Tax Commission; and J. Lambert Gibson, Roscoe E. Hammond, Milton Twitchell, and Heber Benjamin, Jr., Constituting said State Tax Commission.

Silver King Coalition Mines Company, Petitioner.

425

vs.

State Tax Commission; and J. Lambert Gibson, Roscoe E. Hammond, Milton Twitchell, and Heber Benjamin, Jr., Constituting said State Tax Commission.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[March 25, 1946.]

Mr. Justice Brandeis delivered the opinion of the Court.

Whether Utah has submitted itself to suit in the United States District Court for the District of Columbia for the recovery of taxes alleged to be wrongfully exacted by that state is the ultimate issue brought here by these writs of certiorari. Properly, we need decide it in the present proceeding. *See* *supra* at 124.

Petitioners, corporations and citizens of New York and Nevada, respectively, carry on mining businesses in Utah. That state imposes on those there engaged in the mining business an occupation tax equal to one per cent of the gross amount received for or the gross value of metalliferous ore sold during the preceding calendar year. The State Tax Commission administers the Act. Utah Code Annotated (1944) §§ 80-5-65 to 80-5-82, inclusive. For the purposes of this opinion, it need only be said as to the facts which give rise to this litigation, that petitioners seek recovery of that portion of their occupation taxes for 1944 which



was calculated by the Tax Commission by including in the gross amount received by petitioners for their ore certain subsidies for war production paid to petitioners by the United States pursuant to an order of the Office of Price Administration, dated February 9, 1942, No. P. M. 2458. Petitioners assert that this subsidy should not be included in their occupational tax base. As the Tax Commission did include the subsidies in the base after administrative rulings which denied petitioners' claims, petitioners each paid the total tax levied, protested that portion thereof which was based upon the subsidy and brought suit in the United States District Court for the District of Utah against the State Tax Commission and the individuals "constituting" it as "members," for the recovery of the protested amount under sections of the Utah Code (1943), set out below, which petitioners claim authorize these proceedings.<sup>1</sup>

The causes present identical questions. They were consolidated for trial in the District Court and separate judgments were entered for plaintiffs against the "State Tax Commission, et al." for the amounts claimed. Separate appeals were perfected to the Circuit Court of Appeals. The cases were there briefed, argued, and decided together but with separate judgments reversing the District Court with directions to dismiss without prejudice since it was a suit against the state without its consent. *State Tax Commission v. Kennecott Copper Corp.*, 150 F. 2d 905. On account of the importance of the issues, we granted certiorari to determine whether the basis of the decisions in *Great Northern Ins. Co. v. Read*, 322 U. S. 47, and *Ford Co. v. Department of Treasury of*

<sup>1</sup> Utah Code Anno. 1943, 80-5-76:

"No court of this state except the supreme court shall have jurisdiction to review, alter, or annul any decision of the tax commission or to suspend or delay the operation or execution thereof; *provided*, any taxpayer may pay his occupation tax under protest and thereafter bring an action in any court of competent jurisdiction for the return thereof as provided by section 80-11-11, Revised Statutes of Utah, 1933."

*Id.*, 80-11-11 [this is identical with Revised Statutes of Utah, 1933]:

"In all cases of levy of taxes, licenses, or other demands for public revenue which is deemed unlawful by the party whose property is thus taxed, or from whom such tax or license is demanded or enforced, such party may pay under protest such tax or license, or any part thereof deemed unlawful, to the officers designated and authorized by law to collect the same; and thereupon the party so paying or his legal representative may bring an action in any court of competent jurisdiction against the officer to whom said tax or license was paid, or against the state, county, municipality or other taxing unit, on whose behalf the same was collected, to recover said tax or license or any portion thereof paid under protest."

*Indiana*, 323 U. S. 459, encompassed the circumstances of these cases. A single opinion suffices here also.

Federal jurisdiction is claimed under diversity of citizenship and because the controversy arises under the Constitution and laws of the United States. The claim is that the inclusion of the subsidy in the tax base interferes with the War Power of Congress and the Emergency Price Control Act of 1942, 50 U. S. C. §§ 901, 902(e), by taxing the subsidy on surplus production over fixed quotas with the result that a part of the subsidy was diverted from its sole purpose of insuring the maximum necessary production.<sup>2</sup> See Revenue Act of 1942, §§ 209, 735, 56 Stat. 904, 907.

As we conclude that these suits are suits against Utah and that Utah has not consented to be sued for these alleged wrongful tax exactions in the federal courts, we express no opinion upon the merits of the controversy.

This is a suit against the state. Utah has established an adequate procedure for the recovery of taxes illegally collected. When the state collects a tax under protest, the money is segregated and held for the determination of the taxpayers' rights with provision for any deficiency for interest or costs to be paid by the state.<sup>2</sup> The Mining Occupation Tax makes the State Tax Commission the state agency for administration and collection of the Utah tax. The petitioners paid their taxes to the Commission under protest and brought these actions to recover the contested portion.

Petitioners alleged compliance with the act's requirements for reports, assessments and administrative remedies with payment under protest of the controverted sums for Utah to the "State Tax Commission" only. The Commission, alone, is charged to have

<sup>2</sup> Utah Code Anno. 1943, 80-11-13:

"In case any tax or license shall be paid to the state under protest, said tax or license so paid shall not be covered into the general fund but shall be held and retained by the state treasurer and shall not be expended until the time for the filing of an action for the recovery of said tax or license shall have expired, and in case an action has been filed, until it shall have been finally determined that said tax or license was lawfully or was unlawfully collected. If in any such action it shall be finally determined that said tax or license was unlawfully collected, the officer collecting said tax or license shall forthwith approve a claim for the amount of said tax or license adjudged to have been unlawfully collected, together with costs and interest as provided by law, and any excess amount in excess of said tax required to pay said claim, including interest and costs, shall be repaid out of any unappropriated funds in the hands of the state treasurer, or, in case it is necessary, a deficit for said amount shall be authorized."

"exacted final payment" and to have acquiesced in plaintiffs' demand in accordance with statutory requirements to show payment and protest on the Commission's books with resultant segregation of the funds collected from Utah's general funds.

As the suits were against the Commission and the members as "constituting" such Commission, were based upon the payment to the Commission as collector for Utah and sought recovery of the fund, sequestered by section 80-11-13, together with the interest and costs therein provided for, we are satisfied these are suits against Utah. *Mine Safety Appliances Co. v. Forrestal*, No. 71, 1945 Term; *Great Northern Ins. Co. v. Read*, 322 U. S. 47, 51; *Ford Co. v. Dept. of Treasury*, 323 U. S. 459, 462.

Upon the question of the consent of Utah to suit against itself in the federal courts for controversies arising under the Federal Constitution, little needs to be added to our discussion in the *Read* and *Ford* cases. Those cases declare the rule that clear declaration of a state's consent to suit against itself in the federal court on fiscal claims is required. The reason underlying the rule, which is discussed at length in the *Read* and *Ford* cases, is the right of a state to reserve for its courts the primary consideration and decision of its own tax litigation because of the direct impact of such litigation upon its finances.

Petitioners point to distinctions between the present cases and those to which reference has just been made. They call attention to the history of the section authorizing recovery of taxes unlawfully collected. Section 80-11-11 was enacted in 1896 without the inclusion of the state as a possible defendant. Laws of Utah 1896, Ch. CXXIX, Sec. 180, p. 466. It was amended in 1933 when the words "state" and "or other taxing unit" were added. Petitioners urge that since the phrase "in any court of competent jurisdiction" had been assumed to permit suits in the federal courts that practice should be read into the word "state" when that entity was made subject to tax suits.<sup>3</sup>

It is also urged that "any court of competent jurisdiction" has long been construed in the federal statutes as including both state and federal courts.<sup>4</sup> Our attention is directed to section 80-5-76

<sup>3</sup> These examples of suits in federal courts were cited: *Bassett v. Utah Copper Co.*, 219 F. 811 (Section 80-11-11 was then Section 2684); *South Utah Mines v. Beaver County*, 262 U. S. 325 (Section 2684); *Salt Lake County v. Utah Copper Co.*, 294 Fed. 199; *Beaver County v. South Utah Mines & Smelters*, 17 F. 2d 577.

<sup>4</sup> *Shoshone Mining Co. v. Rutter*, 177 U. S. 505, 506.

limiting statutory review of administrative decisions of the Mining Occupation Tax to the Supreme Court of the state while allowing suits for recovery of unlawful taxes paid under protest to "any court of competent jurisdiction."

For these reasons petitioners contend that the Utah statutes indicate an intention to permit suits against the state in federal courts. Furthermore, petitioners find significance in variations between the state statutes in the *Read* case and the *Ford* case on one hand and the Utah statutes on the other. Petitioners show that we place reliance in both cases on the procedural requirements of the respective statutes of Oklahoma and Indiana.<sup>5</sup> We said in those cases that since state laws could not affect procedure in federal courts, it was to be inferred that only state courts were included in the states' consent to suit.

The bases for inference advanced by petitioners might logically lead to a conclusion that Utah intended to submit the interpretation of its tax statutes to federal trial courts where the controversies arise under federal law. On the other hand, it may be cogently argued that the practice of treating the federal courts as courts of competent jurisdiction under section 80-11-11 before the addition of the state as a possible defendant resulted from the fact that consent was not necessary for suits against counties and municipalities.<sup>6</sup> It could be urged that grants of jurisdiction to courts of competent jurisdiction by federal legislation for the benefit of litigants other than the United States are not persuasive as to the intent of a state to consent to suits in federal courts. We are informed that Utah employs explicit language to indicate, in other litigation, its consent to suits in federal courts.<sup>7</sup> It is to be noted that the cases under consideration illustrate the disadvantage of deducing from equivocal language a state's consent to suit in the federal courts on causes of action arising under state tax statutes. The disadvantage referred to is that, if the merits were to be passed upon, the initial interpretation of the meaning

<sup>5</sup> 322 U. S. at 55; 323 U. S. at 465-66.

<sup>6</sup> *Lincoln County v. Luning*, 133 U. S. 529; *Checot County v. Sherwood*, 148 U. S. 527. See *Hopkins v. Clemson College*, 221 U. S. 636.

<sup>7</sup> Compare *Minnesota v. United States*, 305 U. S. 382, 389.

<sup>8</sup> Utah Code Anno. 1943, 104-3-27.

<sup>9</sup> Upon the conditions herein prescribed the consent of the state of Utah is given to be named a party in any suit which is now pending or which may hereafter be brought in any court of this state or of the United States for the recovery of any property real or personal.

and application of a state statute would have to be made by a federal court without a previous authoritative interpretation of the statute by the highest court of the state. See *Spector Motor Co. v. McLaughlin*, 323 U. S. 101, 103-105.

We conclude that the Utah statutes fall short of the clear declaration by a state of its consent to be sued in the federal courts which we think is required before federal courts should undertake adjudication of the claims of taxpayers against a state.

*Affirmed.*

The CHIEF JUSTICE and Mr. Justice JACKSON took no part in the consideration or decision of this case.

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Mr. Justice FRANKFURTER dissenting, with whom Mr. Justice DOUGLAS and Mr. Justice BURTON concur.

Even while the Civil War was raging Lincoln deemed it important to ask Congress to authorize the Court of Claims to render judgments against the Government. He did so on the score of public morality. "It is," wrote Lincoln in his First Annual Message, "as much the duty of Government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals. The investigation and adjudication of claims in their nature belong to the judicial department." 7 Richardson, Messages and Papers of the Presidents, 3245, 3252. Both the United States and the States are immune from suit unless they agree to be sued. Though this immunity from suit without consent is embodied in the Constitution, it is an anachronistic survival of monarchical privilege, and runs counter to democratic notions of the moral responsibility of the State.

Not so long ago this Court acted on the realization that "the present climate of opinion . . . has brought governmental immunity from suit into disfavor." *Keifer & Keifer v. R. F. C.*, 306 U. S. 381, 391. Today the Court treats governmental immunity from suit as though it were a principle of justice which must be safeguarded even to the point of giving a State's authorization to be sued the most strained construction, whereby a federal court sitting in Utah is made to appear not a "court of competent jurisdiction." Thus, while during the last seventy-five

years, governmental immunity from suit, as a doctrine without moral validity, has been progressively contracted, the Court now takes a backward step by enhancing a discredited doctrine through artificial construction.

In doing so the Court also disregards the historic relationship between the federal and the State courts. It treats a federal court sitting in a State as though it were the court of an alien power. The fact is that throughout our history the courts of a State and the federal courts sitting in that State were deemed to be "courts of a common country." *Minu. & St. Louis R. R. v. Bombolis*, 241 U. S. 211, 222. As a result, federal rights were enforced in State courts and a federal court sitting in a State was deemed to be "a court of that State," even as to a litigation like that of a condemnation proceeding which would appear to be peculiarly confined to a State court. *Madisonville Traction Co. v. Mining Co.*, 196 U. S. 239, 255-56; *Ex parte Schoonenberger*, 96 U. S. 369, 377; *Neirba Co. v. Bethlehem Corp.*, 308 U. S. 165, 171.

A State may of course limit its consent to suit in its own courts. It may do so by explicit language or by implication through procedural requirements and restrictions which could not be satisfied by a federal court sitting in the State. Such were the grounds of the recent decisions in *Great Northern Life Insurance Co. v. Read*, 322 U. S. 47, and *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U. S. 459. These decisions, as the Court concedes, relied on procedural requirements of the respective statutes of Oklahoma and Indiana which the federal courts in these States could not meet. Therefore, those statutes impliedly granted the State's consent to be sued only in the State courts, for only these could meet the State's procedural requirements.

Utah made no restriction on the right to sue. The statute giving consent to suit merely requires the court in which suit may be brought to be a "court of competent jurisdiction." That the District Court for the district of Utah is otherwise a "court of competent jurisdiction" is not gainsaid. How could the State include the United States District Court in its consent to be sued in a "court of competent jurisdiction" short of stating explicitly that a "court of competent jurisdiction" shall include the federal courts? The opinion does not say that nothing short of such specific authorization to sue in the federal court gives the State's

consent to be sued there. But if such a formal requirement be the meaning of the present decision, it runs counter to a long course of adjudication and pays undue obeisance to a doctrine, that of governmental immunity from suit, which, whatever claims it may have, does not have the support of any principle of justice.